TANDON LAW SERIES

Law of torts

GAURI SHANKAR TANDON

TANDON LAW SERIES

LAW OF TORTS

(Based on Winfield, Salmond, Dr. Jenks, Ratanlal and Others).

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PREFACE

The book has been written for the students of Law Classes studying in the various universities and those appearing at the Competitive examinations. The author has attempted to present the subject matter in such a way that it may serve the purpose of the students for answering the examination questions. It is full of illustrations, examples and cases of law. The Leading cases have also been included.

The author has present the latest cases in simple language and a lucid style. The questions and asked in the various law examinations have also been included in the book.

It is hoped that the students and teachers would welcome and patronise the book.

—Publisher.

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CHAPTER I

NATURE AND DEFINITION OF TORTS

Q. Define Tort and explain This essential features.

Q. Define Tort. Distinguish Tort from Crime and breach of Contract. (L. U. 1978)

Ans. Meaning:—The term "tort" is a French word English equivalent of which "wrong". The terms "tort" and "wrong" were synonymous and are applied in one and the same sense. Tort is derived from the Latin term "tortum" while wrong is identical with "wrong." Both these English and Latin terms mean conduct which is twisted or tortious.

Definition– Various writers have defined tort in different ways. According to *Salmond* "Tort is a civil wrong for which remedy is a common law action for unliquidated damages, and which is not exclusively the branch of contract or the breach of a trust or other merely equitable obligation."

Winfield defined tortious liability in the following words "tortious liability arises from the breach of a duty primarily fixed by the law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages"

From the above definition inference can be drawn that the following are the essential features of 'tort'.

(1) A tort is a kind of civil-wrong as opposed to crime. There are other kinds of civil wrongs. For example breach of contract, breach of trust and similar other wrongs. But these civil wrongs do not fall within the scope of tort.

(2) Tortious liability arises from the breach of duty fixed by law. It is necessery condition for tortious liability that the duty which is broken or right which is violated is primarily fixed by the law. Tort has nothing to do with the agreement which the parties may enter into Tortious liability cannot be created by an agreement of the parties concerned. They cannot subject to certain exception, negative its existence by a mutual agreement. I am under a duty not to defame anyone, not to create nuisance, not to assault anyone because the law says I am under such a duty and not because I have entered into an agreement with anyone. It is clear that tort is different from contract and bailment. Contract is the creation of the agreement of the parties and bailment is also the creation of the parties. But in tort the parties have no hand.

(3) **The duty is towards persons generolly:**—The duty fixed by law is towards persons in general. It is not towards a particular person. I am under a duty not to assault *A* or *B* only. But I am under a duty not to assault any member of the society or community. The law prohibits to doing of any wrong to any person.

(4) Breach of duty is redressible by an action for unliquidated damages. In tort breach of duty is redressed by an action for unliquidated damages. The person who has received injury brings an action for a damages. Unliquidated damages are those damages in which the plaintiff seeks to recover such an amount from the defendant as the court in its discretion is at liberty to award. In other words these damages are not ascertained beforehand. For example *A* is injured by *B* and *A* brings an action to claim Rs. 1000 as damages. *A* cannot say that he has a right to decide what amount "*A*" ought to get damages from '*B*'.

Tort and Crime Distinguished—Tort and crime differ from each other with regard to the following considerations: (i) As to the nature of wrong, (ii) As to remedy available and (iii) As to procedure.

Let us see each one by one :—

(1) At to the nature of wrong—A tort is a private wrong as opposed to public wrong. It is an infringement of the private right of an individnal. The crime on the other hand is an invasion of public right. Crime affects the whole society whereas tort affects the rights of an individual. One is thus a wrong against the community as a whole while the other is as infringement of a private persons right.

(2) As to Remedy Available—In the case of tort the tort-feasor (i. e one who commits a tort) has to compensate the wronged party by paying damages. In the case of a crime, offender is punished by the state. The offender is punished so that the offender as well as those who are like minded may take lesson from the punishment given by the state to the offender. In other words the punishment given to an offender puts a fear into the hearts of the people who are like minded and it is hoped that this fear will deter them from committing crime. In the case of tort no punishment is given. The tort-feasor has simply to compensate the wronged person.

Looking from a slightly different angle it can be safely said that to undo a wrong done by a criminal is never the aim of the criminal law. Its aim is to punish the criminal whereas to compensate for the damage done by a tort-feasor is the aim of the law of tort. This compensation is given by the tort-feasor to the wronged.

3. As to Procedure—In the case of tort a civil suit is instituted by the wronged party to against the tort-feasor and it is his personal matter to maintan the suit. In the case of a crime the proceedings aginst the offender are brought by the state and state maintains it. The damages in the case of tort are paid to the wronged person by the tort-feasor and thus money becomes personal propesty of the party

wronged by the tort feasor. In the case of crime on the other hand if a fine is imposed on the offender the money paid by him goes into the government treasury and the person whose night or property is damaged by the criminal does not get any money out of this penal amount.

The intention of the wrong doer is not material in the case of tort but in the case of a crime intention is of vital importance.

Lastly in the case of tort the wronged person has to bring a civil suit himself in proper court of law and seek redress. In the case of crime the prosecution proceedings are generally brought, maintained and continued by the state and the person who has suffered injury has to help the state in prosecuting the criminal. A tort-feasor has to pay damages whereas as a criminal has to suffer punishment or has to pay fine.

Tort & Breath of Contract distinguished—Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligation under-taken by the contract."

Dr. Winfield draws the distinction between tort and contract in the following words, "At the present day tort and contracts are distinguishable from one another in that the duty in the former are primarily fixed by the parties themselves. Moreover, in tort the duty is towards persons generally, in contract it is towards a specific person or specific persons".

Thus we see (*i*) that a breach of contract is the violation of a duty agreed upon by the parties while a trot is a violation of a duty enforced by the law of land.

(*ii*) A tort is a violation of right in rem (right vested in some person and is available against world at large). Whereas a breach of contract is a violation of right in personam (right available against some determinate person or body).

(*iii*) Privity between the parties is necessary for an action for breach of a contract, but for action in tort no privity is needed.

(*iv*) Motive of the defendant for an action for the breach of contract is immaterial, whereas in tort it is some-times taken into consideration.

(*v*) For the breach of contract damages are awarded by way of compensation for the loss sustained due to the breach. On the other hand in action for a tort often exemplary damages are awarded to punish the wrong-doer. The damages in tort are unliquidated but in the case of contract the damages are determined by the parties themselves.

Sometimes the same act may amount to tort and the breach of a contract. In a case a father employed surgeon to attend on his son. The son was injured for unskilful treatment. In this case there was a contract between father and the surgeon but there was no contract between son and the surgeon. The father, may therefore, sue the surgeon for the breach of contract but son can sue in tort [*Gladwelle v. Stegale* (1834) 5 Bing N. C. 733 L. J. C. P. 361].

Q. "The law of tors consists of a neat set of pigeon holes, each containing a labelled tort. If the defendant's wrong will not fit any of these pigeon holes, he has committed no tort," Comment.

Ans. Schools of Thought—There are two schools of thoughts. Each school has put forward different views on the question of tortious liabilities. According to one school of thought, Law of tort does not consist of General Principles. On the other hand the law of torts contains a number of rules which prohibit certain kinds of harmful activities. It leaves all other harms outside the field of legal liabilities. As Criminal Low consists of a body of rules about particular offences *e. g.*, theft, robbery, in the same way law of torts consists of a body of rules about specific injuries, *e. g.*, defamation etc. Thus according to this theory the basic question is the nature of cause of action which means the plaintiff has to prove as to under what head of tort he seeks remedy. The only fact that he has suffered demage or loss will not make him entitled to get any relief.

Salmond was of the view that law of torts does not consists of fundamental general principles, but it consists of a number of specific rules prohibiting certain type of harmful actions and leaves the remaining action outside the field of legal responsibility. This view has been accepted by the English law. When "*A*" is prosecuted by "*B*" for a certain offence or sued for a tart it is for "*B*" to prove that the case falls within some specific and established rule of liability and not for "*A*" to defend himself by proving that his action or activity is within some specific or established justification or excuse.

Salmond said "The forms of action are dead, but their ghost still haunts the precincts of the law. In their life they are powers of evils, and in death they have not wholly ceased from troubling.'; This was recognised in *Allen V Flood* (1898) A. C. I 138 where Lord Herschell held that every plaintiff must bring his case under one of the recognised heads of torts.

Winfield was doubtful about this theory. He opined that there was not a single case in which action has been refused on the ground that it was new. The fact that a particnlar case is new one may raise presumption against it. "Torts are infinitely various" said *Pratt C. J.* ia chapvanm Pickersgill, not limited or confined.

The theory propounded by *Salmond* does not seem to be sound. Now the theory that all harms are done without just cause and excuse has been receiving favour. The theory of liability for harm with specific justification finds support in the following words of *Bawven, L. J.* in *Skimer v. Shaw* (1893) I. Ch. 422 "At common law there was a cause of action whenever one person did damage to another wilfully and intentionally without just cause and excuse.

Q. There is a law of tort, but not a law of torts. Critically examine the statement.

Ans. There is a difference of opinion on the questian whether there is a law of tort or torts. The two schools have expressed different views. *Salmond* maintained that there was a law of torts *i. e.* there was liability only for certain specific torts and unless the damage suffered could be brought under a recognised head of liability there was no remedy. This school is of the view that just as there are certain specific crimes, in the same way there are certain specific torts. In support of this view they point out certain cases the plaintiff suffered loss or injury but no damages were awarded against the defendant.

The other school maintains that there is a law of tort *i.e.*, all injuries done to another person are torts unless there be some justification or excuse recognised by law. According to this view if "*A*" injures his neighbour "*B*" the latter can sue "*A*" in torts. It is immaterial whether the wrong done to "*B*" has a particular name like assualt, battery, deceit and defamation or whether it has no specific, title. If this view is taken to be correct, then courts can create new torts and the law of tort can be extended.

The greatest difficulty with the first theory is that it limits the expansion of the law of torts. The theory makes the scope limited. It has been observed that the law of tort has been growing and from time to time courts have created new torts which were given no name before. There is no majority of opinion in favour of the view that the law of torts is based upon a general principle that all harms to another person are unlawful. *Winfield* said "At any rate it is clear from these and other instances that the law of torts is steadily expanding and the idea of its being cribbed, cabined and confined in a set of pigeon holes is untenable."

Dr. Jenks has supported the view of *Salmond*. According to *Jenks* it is wrong inference, to accept *Salmond's* views, that new torts can not be created by judicial decisions. He admitted that the new torts can be and have been created but he contended that it is perfectly consistent with *Salmond's* view because these torts regarded them as substantially similar to torts which they have already recognised. In his opinion new torts are not the result of the general principle that all harm which are not justified are tortious.

Winfield did not see eye to eye with this view of *Dr. Jenks*. He asked, " is it really true that all the new torts known to us are substantially similar to torts which are already in existence, whereas the substantial similarity between the deceit of nineteeenth century and deceit which became tort in 1789 ? *Winfield* however, modifying his opinion, comes to the conclusion that "from a narrow practical point of view "*Salmond's* view "suffices" but he also believes that 'from a broader outlook' his theory is invalid.

Maxims

Q. Explain and illustrate any two of the following. (L.U. 1978)

(*i*) *Injuria Sine Damno*

(*ii*) *Damnum Sine Injuria*

(*iii*) *Ubi Jus ibi remedium*

Ans. (i) Injuria Sine Damno—Injuria means the breach of a legal right. 'Damnum' means damages or injury. The maxim Injuria Sine Damno means breach of legal right without damage or injury. This means whenever there is invasion of a legal right, the person whose legal right is infringed or he is prevented from the exercise of his legal right, such aggrieved person can bring an action and recover damages although he may have suffered no actual loss or harm. It has been observed in *Eutices V. Corrington* (1765), 19St. Tr. 1066 that "By the laws of England every invasion of private property, be it ever so minute, is trespass. No man, can set his foot upon my ground without my licence, but he is liable to an action though the damage be nothing."

The maxim injuria sine damno is well illustrated in *Ashley V. White* (1703) 2 Ld. Raym 938 where lhe plaintiff was entitled to vote at an election. He tendered his vote. The vote was rejected by the defendants. The candidate for whom the was desirous of voting was elected. The plaintiff brought an action for damages against the defendants for refusing his vote and obtained a verdict.

(ii) Damnum Sine Injuria—It means loss without injury or harm. This is not actionable. If by an action of "*A*" injury is caused to "*B*" but no legal right is violated, no action will lie. The man who has substained loss in business competition or is injured by a spiteful action of his neighbour, has no action in tort. If I have a shop and another person opens a shop in my neighbourhood thereby brings fall in my profit. I cannot bring action against him.

In *Chasemor* v. *Richards* (1859) 7 H. L. C. 349 a land owner and a mill owner who had for six years enjoyed the use of a stream, which was chiefly supplied by percolating underground water, has lost the use of the stream after an adjoing owner has dug, on his own ground, an extensive well for the purpose of supplwing water to the inhabitants of the district. In an action brought by the land owner it was held that he had no right of action for there is no legal right to the enjoyment of the water flowing otherwise than in a defined channel.

In *Mayor of Bradford* v. *Pickles* (1895) A. C. 587, Bradford corporation refused to purchase Pickles land in connection with the scheme of water supply for the inhabitants of the town. Pickles annoyed with the refusal sank his shaft on his land. The water which percolated through the sub-soil of his land in unknown and undefined channel from the land of the corporation, which was no higher level than 'Pickles' and was consequently discoloured and diminished when it passed to the lower land of the corporation.

The corporation sued for an injunction to restrain Pickles from diminishing or polluting their water. They contended that his conduct (*i*) was unlawful because it was dictated by an evil motive, and (*ii*) contravened a local statute connected with the water works. The House of Lords held that Pickles was not liable on either ground. It was observed that the real answer to the claim of corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded.

In the case of *Mogul Stemship. Co.* v. *Meregor,. Gow and Co.* (1892) A. C. 25 a combination of Ship owners agreed to regulate the divisions of cargoes and freight from a particular port and to allow a rebate to all shippers who shipped only with the members of the combination. The effect of this agreement was to force the plaintiff to carry freight at unremunerative rates. In an action alleging conspiracy the House of Lords held that as the defendants had acted with the lawful purpose of extending their trade and increasing their profits and not with any malicious design to injure the plaintiffs, the plaintiffs were not entitled to recover the damage they had suffered by reason of the defendant's acts.

In the case of Gloucester Grammar School case, the defendant, a school master, set another school near to the plaintiff's school. As a result of this the boys from the plainiff's school joined defendants school. Plaintiff sued the defendant for damages. It wes held that "no suit could lie on the ground that *bana fide* competition can afford no ground of action, whatever damage it may cause".

(iii) **Ubi jus ibi remedium**—The maxim means wherever there is a right there is a remedy. The basis of low of tort is that law provides remedy for every wrong : where there is a right there is a remedy. When right of a person is infringed a great wrong is done to him. The wrong done to the person ought to be remedied otherwise there would be no use of having this right. The principles of the law of torts are founded on the doctrine that law provides remedy for every wrong and thus the law of tort has come into existence.

Hold C. J. in *Ashby v. White* observed that "if a man has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it and it is a vain thing to imagine a right without a remedy : want of right and want of remdy are reciprocal.

It is not necessary that substantial damage should be caused by the wrong. It is enough for getting the remedy if the national damage has been caused that is to say if the right of a person has been violated. The principle of ubi jus ibi remedium was first time established in *Ashby v. White*.

It is said that law of tort is a development of the legal maxim ubi jus ibi remedium there is no wrong without remedy or where there is a wrong there is a remedy. Where a man has a right "he must of necessity have means to vindicate and maintain of and a remedy if he is injured in the exercise and enjoyment of it and indeed it is a vain thing to imagine a right without a remeny." Want of right is want of remedy and presence of or existence of a right is existence of a remedy. In other words want of right and want of right are reciprocal. "The maxim does not mean......that there is a legal remedy for every moral or political wrong. If this were its meaning it would be manifestly untrue. There is no legal remedy for the branch of a solemn promise not under seal and made without consideration, nor for many kinds of verbal slander though each may involve utter ruin, nor for oppressive legislation, though it may reduce men practically to slavery nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms and it would be more untelligibly and correctly stated, if it were reversed, so as to stand," "where there is no legal remedy, there is no legal wrong." There is no right without a remedy in any law. If all remedies for the enforcement of a right are gone, the right must be deemed to have ceased to exist in the eyes of law.

CHAPTER II

TORTIOUS LIABILITY

Q. What is the foundation of Tortious liability ?

Or

All injuries done to another person are torts unless there is some justification recognised by law. Discuss

Ans. First theory—*Sir Fredrick Pollock* propounded the theory that all injuries done to another person are torts unless there is some justification recognised by law.

Dr. Jenks and *Salmond* held different views and opened that there is a difinite number of torts outside which liability in tort does not arise.

According to the first theory "If I injure my neighbour he can sue me in tort whether the wrong happens to have a particular name like assault, battery, deceit, defamation. Whether it has no special title at all, I shall be liable if I cannot prove lawful justification." Talking this account the law of tort consists not only of those torts which have acquired specific names but also includes the wider principle that an unjustificable harm is tortious. On the basis of this theory the courts can create new torts.

This theory receives support from the fact that the courts have repeatedly extended the domain of tort by creating new torts. A number of torts emerged in the nineteenth century.

Second Theory—*Salmond*, the propounder of second theory, cited several cases in which the plaintiff suffered injury he could not recover any damages in an action in tort. For example the cases of *damnum sine injuria* in which cases there was loss without injury. The defendants were not held liable in such cases.

Further, it is said that it may be admitted that new torts can be created by courts but such new torts are substantially similar to existing torts.

These two arguments do not seem tenable. It may be said that the maxim *damnum sine injuria* simply means that all harm is not tortious but where the harm is unjustificable it is tortious, without consideration of the fact whether there is a given name for the particular unjustificable harm. As to second argument it is not correct to say that new torts are similar to torts which the courts have already recognised.

Q. What are the conditions of liability in torts ?

Ans. Conditions of liability in Torts—The conditions necessary before liability in torts arises are the following :—

(i) Any act or omission on the part of the defendant.

(ii) Intention or negligence, or breach of the strict duty on the part of the defedant.

(iii) Damage to the plaintiff.

(i) Act of Omission on the part of the defendant—The first condition is that there must be omission on the part of the defendant. This means doing of an act which has been prohibited by law or omission of an act which is mandatory for the defendant to do. Thus we see that liability in to it arises if the defendant does something which he is not supposed to do under law or the defandant omits to do something which the law has made it obligatory for him to do. Where defendant because of rash driving of car injures the plaintiff he is liable in torts. If '*A*' does not put a sign board for the passers by warning them that there has been made a ditch by taking out the earth from the ground on his land and '*B*' falls into it causing physical injury to himself ; '*A*' makes himself liable in tort.

(ii) **Intention**—Intention implies mental state. Where a person does an act with the knowledge and desires of its consequences he is said to intend those consequences. No one can say what passes in the mind of other person, but in law what a man thinks. must be deduced from what he says and does i. e., his conduct. It is possible that a man may not desire certain consequences of his action and omission but still he may be held responsible for the consequences. This is the outcome of the rule that "a party must be considered, in point of law, to intend that which is necessary or natural consequence of that which he does."

(iii) **Negligence**—In neglience there is no desire for consequence. There is only carelessness on the part of the defandant. "The careless man is he who does not care-who is not anxious or not sufficiently anxious that his activities shall not be the cause of loss to others."

(iv) **Breach of strict duty**—In some case the detendant is liable without any intention or negligence on the part of defandant. For example owner of cattle is liable if injury is caused by his cattle straying from his land to the adjoining land. If has been laid down in *Ryland v. Fletcher* "if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he does so at his peril. If it does escape and causes damage, he is responsible however careful he may have been and whatever precautions he may have taken to prevent damage."

Damage—There is no liability unless the damage or loss has resulted to the plaintiff. There must be some casual connection between the wrongful act and damage sustained by the plaintiff."

Q. Discuss how far the motive with which the act is done is material to the question whether it constitutes an actionable tort.

Ans. Motive of the Act—A wrongful motive does not usually create liability in tort. If *A* is injured by the action of *B* ; *A* has no remedy against *B* if *B*'s act is lawful in itself and is carried out without adopting unlawful means. It makes no difference to the above position that *B* in so doing had the purpose of injuring *A*. A bad motive does not turn a lawful action into an unlawful one. We have seen this in the case of Mayor of *Bradferd v. Pickles* where bad motive of Pickles did not make his lawful action an unlawful action. The corporation for its local water supply scheme would not buy Pickles land at his own price. *Pickles* took steps to stop underground water from percolating from his land to that of the corporation. For this action *Pickles* was held not liable. "It is the act and not the motive for the act that must be regarded. If the Act, apart from motive gives rise merely to damage without legal injury the motive however, reprehensible it may be will not supply that element." This rule was again affirmed by the House of Lords in *Allen v. Flood* (1898) A. C. I. in which case a company had been employing the plantiff's non-union men, by the day. The defendant's union informed the company of the determination of their men to leave the company's service unless the plaintiff's non-union men were discharged. Thus the defendant procured the company to refusal at the of a certain day to employ the plaintiff, the refusal not being a breach of contract or other legal duty by the company. The plaintiff's employment would have been continued but for what the defendant did; and the plaintiff suffered damage.

Held—The defendant was not liable, whatever might have been his motive. "A man has the legal right to say what he please, to induce, to advise, to exhort, to command, provided he does not slander or deceive, or commit any other form of the wrongs known to the law of which the speech may be the medium."

In the following cases evil motive is relevant in the law of torts :—

(a) Malicious prosecution.
(b) Defamation where qualified privilege or fair comment is pleaded in defence.
(c) Conspiracy.
(d) Nuisance.

Q. How far Malice is relevant in an action in Tort ?

Ans. Relavancy of malice—The word "malice" has two different meanings in the law of torts. It means in the common parlance an act dictated by angry feeling or vindictive mood. (*Slockley v. Horridge*). Malice means ill-will against a person. Such malice is described as express malice or actual malice or malice in fact.

Legal malice or malice in law, on the other hand, means a wrongful act done intentionally without just cause or excuse. If I give a stranger a blow likely to result ie death I do it of malice because I do it intentionally without just cause or excuse.

The definition of malice in law has been beautifully put forward by *Bayley, J.* in *Bramage v Prossor* which runs as follows:—

"Malice in common acceptance means ill-will against a person but in its legal sense, it means a wrongful act done intentionally without just cause or excuse. If I kill or maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice because it is a wrongful act and done intentionally. The word wrong fulmeans infringement of some legal right".

According to *Brown J.* "where a man has a right to do an act, it is not possible to make his excuse of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense.

Thus a lawful act does no become unlawful merely because it is done with a bad motive or malice ; nor is a good motive a justification for an act which is otherwise illegal.

Q. Distinguish between malice in fact (express malice) and implied matice.

Ans. **Malice in law is express malice as well as implied malice** —That is when from the circumstances of the case the law infer malice. But express malice is that necessarily malice in law ; for example a prosecution which started with most express malice but with a reasonable and probable cause, will give no ground for an action to recover damages for malicious prosecution. Malice in law depends upon knwoledge but malice in fact depends upon motive.

The decision of the House of Lords in *Allen v. Flood* has settled that an act, not otherwise unlawful. cannot generally be made actionable by an averment that it was done with malice and evil motive. A malicious motive itself does not amount to a legal wrong. The main principle is that in any legal question, malice depends not upon the evil motive of the actor but upon the illegal character of the act which he conteplated or committed.

The more important of the exceptional cases where malice is held to be relevant are the wrongs of (i) Defamation on a privileged occasion. (ii) Malicious prosecution (iii) Wilful and malicious damage to the property, (iv) Maintenance, and (v) Slander of title.

In an action of defamation where the defendant pleads qualified privilege, the paintiff can defend it by proving malice in fact. It is, therefore, not correct to think that "Malice is entirely irrelevant in the law of torts".

It has been mentioned above that malice in law means wrongful act done intentionally without just cause or reason. A man may be guilty of malice in law even though he acts ignorantly or innocently or with a good motive. The follwing case makes the principle clear. In the case of *Quinn* v. *Lathan* (1901) A. C. 495. *A*, intentionally and without lawful justification, induced *B's* workmen to discontinue their work in breach of their contract with *B*. *A* did this prompted by a good motive to do good to both *B* and *B's* workmen. It was held that nonetheless *A* was liable inasmuch as the procurement of the breach of contract without just cause was a tort and as such actionable.

In brief the following is the distinction between the two ;

(a) Express malice, in fact is an act done with ill-will towards, an individual ; malice in law means an act done wrongfully and without reasonable and probable cause and not in common parlance an act dictated by angry feeling or vindictive motive. To constitute legal malice, the act done must be wrongful.

(b) Malice in fact depends upon motive, malice in law depends upon knowledge.

(c) Malice in fact means ill-will or any improper motive against a person but in its legal sense that in malice in law, it means the concurrence of the mind with a wrongful act done without just cause or excuse.

Q. Explain the circumstance in which an Indian Court can taken cognizance of a tort committed abroad.

Ans. Congnizance of tort committed Abroad—The law of torts as administered in India is the English law of torts. It has been, of course, mobified to some extent by Indian Legislation. Tort committed abroad have always been triable in Engilsh Courts provided they expressly fulfilled the following conditions :—

(i) The wrong committed must be of such a nature which could have been actionable if committed in that country.

(ii) The wrong must not have been justifiable by the law of the country where it was committed. It is not necessary that the wrong should have been actionable where committed ; it is sufficient if it was unlawful.

(iii) The tortious act against which the action is proposed to be brought must not be an act of local nature, such as trespass to or ouster from, land or a nuisance.

In England no action can be taken for an act committed in foreign country if (i) it is lawfull by the law of that country at the time when the act was actually committed.

(ii) It was excusable or (iii) Subsequently such an act was declared legal by virtue of *expost facto* legislation in that country.

S. R. Aiyar explains the position of Indian law as follows :—

An action for trespass or other injury to land outside Indian cannot be brought in India. In the case of other torts committed abroad an action will lie in India if the defendants reside in India. There are however two couditions :—

(a) The act must be unlawful where it was committed. In *Philips v. Eyre* an action for false imprisonment of the plaintiff alleged to have been committed by the Governor of Jamaica was held not maintainable in England because in respect of this and others acts done in the course of suppressing a rebellion, an indemnity Act of the Local legislature protected the defendant from action. *Machalo v. Foutes* (1897) 20. B. 231 an action for libel published in Brazil was allowed in England through libel was not actionable but only a crime in the law of Brazil. Similar principle would be followed in India.

(b) The tort must be actionable according to the law of India.

Q. Explain the following :--

(a) Malfeasance.

(b) Misfeasance.

(c) Non-feasance.

Ans. (a) Malfeasance—The term malfeasance applies to the commission of an unlawful act. It is generally applicable to those unlawful acts such as trespass, which are actionable *perse* and not require proof of negligence and malice.

(b) Misfeasance—The term 'Misfeasance' is applicable to improper performance of some lawful act.

(c) Non-feasance—The term 'non-feasance' applies to the failure or omission to perform some act in which there is an obligation to perform. Non-feasance of a gratuitoos undertaking does not impose liability.

CHAPTER III

DEFENCES

(Conditions which in general negative liability)

Q. What are the conditions which in general negative the liability in tort ?

Ans. Defences to an Action In Tort—The circumstances which negative liability in-torts are various, each depending upon the fact of each case. Still, there are certain conditions which negative liability in tort and these conditions They are the applied generally following conditions :—

(i) *Volenti non fit injuria* (where there is consent there is no injury).

(ii) Mistake.
(iii) Inevitable accident.
(iv) Private defence.
(v) Necessity.
(vi) Statutory authority.

Q. Explain and illustrate volenti non fit injuria.

Ans *Volenti non fit injuria* is a possible defence in an action in torts. The maxim means that a person who consents to an act being done or who takes upon himself the risk of suffering damage cannot bring an action in respect of that act of damage. "One man cannot sue another in respect of a danger not unlawful *perse* that was visibly apparent and lawfully encountered," It is matter of common observation that on many occasions harm may be inflicted on a person for which he has no remedy in tort because he consented that risk. The maxim implies where there is consent there is no injury actionable in law of tort. The consent may be (i) Express, (ii) Implied.

Express consent—When a man is engaged in boxjng or wrestling match, he expressly consents for likely injury. When a patient engages a surgeon, it means he has given consent for such possible injury or damage which may occur during the course of operation. Similarly if a person consents for the publication of defamatory statement the maxim of *Volenti non fit injuria* would apply and the defendant can successfully plead that the plaintiff consented to the act being done.

Implied consent—In certain cases there may be implied consent to run the risk. For example a spectator at a cricket match takes upon himself the risk of the ball striking him accidentally. A player in a game of football cannot sue another for assault or injury in the course of the game. The defence of implied consent also applies in the cases of a workman engaged in a dangerous work as in the case of a workman employed in an explosive factory.

Q. What are the limitations to the application of the maxim *Volenti non fit injuria* ?

Ans. **Limitation to the application of the maxim** *Volenti non fit injuria*—The following are the conditions where the maxim *Volenti non fit injuria* does not apply :—

(i) The process must not be unlawful.
(ii) The consent must be freely given.
(iii) The consent is not obtained frauduently and.

(iv) The maxim is *Volenti non fit injuria* and not *scientinon fit injuria* (knowledge in not necessarily implied assent).

1. **The process must not be unlawful**—Dr. Winfield said there is no definite test for deciding what the law will ban in this connection. It certainly does not turn upon the act being criminal as well as tortious, for every assault is criminal and so are some libel, and yet is possible, by assent, to negative tortious liability for many kinds of assault and libel.

The maxim will not apply in the cases which are contrary to public policy. If *A* assents *B* to do certain act which has been prohibited by the law of land the maxim will not apply.

2. **The consent must be freely given**—If consent is obtained under duress or by some force such consent will not absolve the doer from his responsibility. The worngdoer shall be held liable.

3. **The censent is obtained fraudulently**—The consent should not be obtained fraudulently. If *A* obtains consent of *B* by fraud and does some wrongful act, *A* shall be held liable.

In a case where a music teacher told his student that if she allows him to conduct an operation she can sing good song. The girl gave consent and the teacher seduced her. In an action he pleaded consent but he was held liable as the consent was obtained in fraudulent manner.

4. **Knowledge is not consent**—It is a well established law that knowledge of plaintiff about danger does not mean that he has consented for damage or injury. It does not follow that a person always assents to a risk merely because he knows of it.

In *Thomas* Vs. *Quarter Maine* (1887) 18 Q. B. D. 685, the plaintiff was employed in the defendant's brewery and worked in the cooking room There a passage about three feet wide ran between a boiling vat and cooking vat. The rim of the cooking vat rose about 16 inches above the passage. The plaintiff went along a passage to get from under boiling vat a board which was used as a lid and while he was tugging at this lid it came away suddenly and he fell into the cooking vat. He was severely scolded and brought an action for reparation against his employer. It was found in fact that the plaintiff had full knowledge of the danger from the rim of the cooking vat not being fenced, and that for many months.

The court held that the defendant had not been guilty of negligence. The defendant had not been in breach of duty which he as an occupier of premises owed towards a person lawfully on the premises.

Bowen L. J. said—"It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be the knowledge against such circumstances as lead necessarily to the conclusion that the whole risk was voluntarily incurred.

In the case of *Smith* Vs. *Baker* (1891) A. C. 325, Smith, the appellant, was emyloyed by Baker and sons, the respondent. He woked in a cutting on the top of which a crane often swang heavy stons on his head while he was drilling the rock face in the cutting. Both he and his employers knew that there was risk of the stones falling, but no warning was given to him of the movement at which the particular jibling was to commence. A stone from the crane fell upon him and injured him.

A majority of the House of Lords held that (1) Smith had not voluntarily undertaken the risk (2) there was negligence on the part of the respondents ; and therefore (3) the respondents were liable.

In the case of *Dann* Vs. *Hamilton*, the plaintiff was passenger in the car of defendants. The plaintiff knew that Hamilton while far from being dead drunk was under the influence of drink to such an extent as substantially to increase the chances of collison arising from his negligence. The plaintiff was not acting under a pressure of any, legal or social duty or through the absence of alternative and practical forms of transport since she could have gone home by bus. The car was collided and the plaintiff claimed damages for the injury.

Asquith. J. gave judgment for the plaintiff and observed that the knowledge that the driver was under the influence of drink did not preclude her from recovering damage.

In *Bowater* Vs. *Rawley Regin Corporotion* (1944) K. B. 476 Bowater, a carter employed in the road cleaning department of the defendant corporation. Bowater was ordered by his foreman to use a horse which, to the knowledge of both of them, had halted on at least two occasions when being driven by another employee Payne. In the end. Payne refused to take out the horse. Bowater, when ordered to take it out. protested, but the foreman said that the burgh surveyor had said that he (Bowater) was to take the horse to the park. Bowater did take out the horse and for about a month all went well. Not long afterwards; however, the horse bolted and Bowater was thrown out of the cart to which it was harnessed and suffered injury.

Bowater sued for damages. The defendant pleaded *volenti non fit injuria*. The defendant's plea was rejected and the plaintiff recovered the damages.

Scott. L. J. said :—"For the purpose of rule, if it be a rule, a man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicts not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of contraint so that nothing shall interfere with the freedom of his will."

In *Read* Vs. *Lyons and Co. Ltd.* Mrs. Read. had been emploʎed as an inspector of the munition by the armament inspection department of the Minisrry of Supply. She was injured in the course of her duties. Mrs. Read had not voluntarily under taken the workbut had been directet to under the essential work order. Sometime before the date of the accident she had been offered other employment but she had refused to accept this offer.

Mr. Read brought an action and claimed damages for the injury. The defendant pleaded *volenti non fit injuria.* The case was decided in favour of Mrs. Read and the plea taken by the defendant was not accepted.

5. **Rescue Cases**—The maxim has no application where the defendant, by his misconduct, places a third person ini mminent danger from which the plaintiff, acting like a reasonable courageous person, endeavours to rescue him and is injured in consequence. The defendant shall be liable where because of his negligence plaintiff is injured in rescuing third party.

This has been illustrated in *Hoynes* Vs. *Harwood and Sons* (1935) I.K.B. 146 where the defendant's servant left a two horse van unattended in a street. The horses ran away with the van. The plaintiff, a police constable, was on duty, not in the street, but in a police station. He was the run-away horses and ran out of the police station and also saw that a woman and many children were in grave danger of being run-over. At a great risk to himself he seized one of the horses and managed to pull them up, but he was seriously injured in doing so.

The court of appeal held that the defendants were liable to the plaintiff. They considered that the defendant had been negligent, that there was no contributory negligence on the part of the plaintiff and that the consequential harm was not too remote.

Q. What do you understand by the term "rescue cases". *A* pushes a boy into a well. *A* jumps into the well to save the boy. The boy is saved but *B*'s leg is fractured. *B* sues *A* for damages. Is *A* liable ? (L. U. 1978).

Ans. On of the principles of law of tort is that harm suffered voluntarily does not Constitute an injury in the eyes of law and is therefore not actionable. This principle is contained in the well known maxim of the law of tort "Volenti non fit injuria." But this maxim of Volenti not fit injuria is not applicable to rescue cases, where the defendant by his misconduct, places a third person in imminent danger from which the plaintiff acting like a reasonable courageous person, endeavours to rescue him and is injured in consequences. The defendant shall be liable where because of his negligence plaintiff is injured in rescuing the third party.

In the above problem A is liable.

Q. The maxim is volenti non fit injuria ; it is scienti non fit injuria. Discuss.

Ans. *Volenti non fit injria* does not follow that a person always assents to a risk merely because he knows of it. Where a plaintiff has knowledge of the risk involved in the work he is doing, it does not mean that he has assented to encounter the risk. The maxim cannot be pleaded successfully in such cases.

From the date of the judgment of Bowen L. J. in *Thomas* Vs. *Ovarter Maine*, courts have declined to identify, as a matter of course, knowledge of a risk with acceptance of it.

The doctrine that sciens (knowledge) is not volens (consent) was given prominence by the House of Lords in *Smith* Vs. *Barker* (1891) A. C. 325 where it was held that *volenti non fit injuria* had no application to harm sustained by a man from the negligence of his employer in not warning him of the moment of a recurring danger. It matters little that the man knew and understand that he personally ran risk of injury if and when the danger did recur.

It is not only in cases of employer and employee that the defence of *volenti non fit injuria* is limited by the rule that Sciens is not *volens*. In *Dann* Vs. *Hamilton*, the defendant was held liable for causing injury to the plaintiff in car accident. The plaintiff lady knew that Hamilton is dead drunk but she preferred to travel with him in car. But her knowledge of defendant's state of mind did not absolve defendant's responsibility of taking care.

Again in *Dawrant* Vs. *Nutt* (1961) W. L. R. 253, the plaintiff was passenger in husband's motor-cycle combination and injured in a collision which was partly caused by the defendant's negligence. It was park at that time. The plaintiff knew that the lighting system of the motor-cycle combination was out of order. Although Stable J. held that the plaintiff had been guilty of contributory negligence in knowingly travelling in the unilluminated combination, he awarded the plaintiff a proportion of the damages. *Volenti non fit injuria* was not considered.

Problems

Q. 'A' receives injuries in rescuing 'B' from an emergency of danger to 'B's body or life created by negligence of 'C'. Is 'C' liable to 'A' ? Or can 'C' successfully plead ***Volenti non fit injuria.***

Ans. **Plea of Volenti non fit injuria**—The above case is covered by the limitation of rescue case. In the above case C shall be liable to *A* and *C* cannot successfully plead *volenti non fit injuria.*

The maxim has no application where the defendant, by his misconduct or negligence, places a third person in imminent peril which the plaintiff, acting like a reasonable courageous person, endeavours to rescue him and is injured in consequence.

The law is established in *Haynes* Vs. *Horwood and Sons* where the defendant's servant left two horses van unattended a street. The horses bolted and the plaintiff a policeman, in seeing the life of a woman and some children in danger, seized one of the horses and managed to pull them up, He was seriously injured in doing so .The court of appeal gave verdict in favour of policeman and the plea of *volenti non fit injuria* was rejected.

Q. 'A', a lady, was a passenger in the car of 'B' who was driving rashly under the influence of drink. During the Journey 'A' had an opportunity, ifaer she had become aware of 'B's condition of leaving the car but she did not do so. The car met with an accident due to 'B's' negligence. He was killed in the accident and 'A' suffered injuries. 'A' brings an action for damage against 'B's' widow as representing his estate under the law. The widow raises the defence of *Volenti non fit injuria* alleging that 'A' knew it that 'B' was under the influence of drink and she voluntarily undertook the risk of travelling in the car. How will you decide the case ?

Ans. The maxim *Volienti non fit injuria* is a limited by the rule that sciens is not volens. In this case *A*'s knowledge of *B*'s condition does not imply that *A* consented to face any risk. The widow of *B* shall be liable. *A* can recover damages.

In *Dann* Vs. *Hamilton* the facts were similar to that of the above case. It was held in this case that the general rule is that the maxim applies where the plaintiff, by defendant's negligence, voluntarily accepted the risk. It is a questton of fact whether the plaintiff incurred the risk.

The plaintiff by re-embarking in the car, or re-entering it with full knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to or absolve the driver from liability for any subsequent negligence on his part whereby the plaintiff might suffer harm. The case was decided in favour of the plaintiff.

Q. 'A' is injured trying to rescue 'C' himself from peril caused by 'C's' negligence. Decide.

Ans. This case is not different from that of *Haynes* Vs. *Harwood* where a police constable was injured while saving third party from the peril occasioned by the negligence of the defendant's servant.

In the above case *A* put himself in peril to rescue *C* from danger resulted from *C*'s action. In *Baker* Vs. *T. E. Hopkins and Sons Ltd.* a doctor was killed in an attempt to rescue two workmen from a well which was filled with poisonous fumes of a petrol-driven pump. His widow sued the men's employers and succeeded on the ground of their negligence. Barry J. took the view that although no one owes a duty to anyone else to preserve his own safety. Yet if by his own carelessness a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have forseen would attempt to come to his aid.

In view of the fact of the case in *Baker* Vs. *T. E. Hopkins and Ltd*, 'C' is liable to *A* and the later can recover damages from 'C'.

Q. 'A', a guard of goods train receives injuries while attempt to minimize a collision between his train and some wagons belonging to 'G' which ran away owing to the negligence of 'G's' servant. Is 'G' liable to 'A' ?

Ans. In this case *A* intervenes to save the property and not life. Doubts have been expressed as to whether the principles of rescue extended to the case where property was the object of the rescuer's intervention.

In a Scottish decision such an action was held to be maintainable. In the case of *Steel* Vs. *Glasdow Iron and Steel Co.* the guard of a goods train was fatally injured while he tried to avoid the collison between his train and some wagons belonging to the defendant's servants. It was held that although it was not the legal duty of the guard to place himself if such a position of danger, nevertheless his intervention was "the natural and probable consequence" of a chain of events set in motion by an initial act of negligence on the part of the defendant's servant. It was, therefore, held that the plaintiff guard's widow, was entitled to recover.

Q. 'A' and 'B' are owner of separate but contiguous land. 'B' has a tank on his own land, on which there are wild ducks. With the help of boats and decoying he catches some ducks, and sells them in the market. 'A' goes to edge of his own land and fires a gun which scares the ducks and they fly away. Is 'A' liable for damages ?

Ans. In *Keeble* Vs. *Hickeringill*, the plaintiff owner of a duck decoy, brought an action against the defendant for shooting at an disturbing the ducks in his decoy. The court decided that the action was maintainable and judgement was given against the defendant.

It is true that no owner has absolute right to create noise upon his own land because any right which the law gives him qualified by the condition that it must not be exercised to the nuisance of his neighbour or of the public. If he violates that condition he commits a legal wrong, and if he intentionally does so he is guilty of a malicious wrong in its strict legal sense.

But in the above problem ducks were wild and they did not belong to the plaintiff. Therefore, he cannot assert that any damage has resulted to him by the act of defendant and the suit must fail.

Q. How far is mistake defence to an action of tort ?

In *Poland* Vs. *Part* it was observed that vicarious responsibility of a master for the tort of his servant may be neglected by a mistake of the servant which his wrong doing outside the course of his employment. A mistake induced by the plaintiff himself may be a defence *e. g.*, where, as a practical joke, he leads a policeman to arrest him for a crime which he has not committed.

Q. Define inevitable accident and illustrate with an example.

Ans. Inevitable Accident—"Sir Frederick Pollock defined inevitable accident as an accident" not avoidable by any such precaution as a reasonable man, doing such an act then and there, could be expected to take". Inevitable accident does not mean a calamity which could not have been avoided by any measure of precaution whatsoever. It means such as could not have been avoided by a reasonable man at the moment at which it occurred. It is common knowledge that a reasonable man is credited by law with perfection of judgment.

Where *A* is driving a car and he fell unconscious on the back thereby causing injury to *B*. *A* can plead in his defence inevitable accident and shall not be held liable for a damage.

Q. Is inevitable accident a valid defence to an action in tort ?

Ans. Inevitable Accident whether valid defence—Inevitable accident is in general a good defence as actions of tort. This is the plea that the damage in question could not have been prevented by the exercise of reasonable care on the part of the defendant. In other words, it is the plea that the conduct of the defendent was neither wilful nor negligent. The defendent while taking help of inevitable accident must prove that there was no negligence on his part.

In *Fardon* Vs. *Harcort* (1932) 146 L. T. 391, the defendant and his wife, driving a motor car with chauffeur, went Selfridge and parked their car with its back against the pavement and they went in the shop to make purchases.

In *Poland* Vs. *Parr* it was observed that vicarious responsibility of a master for the tort of his servant may be neglected by a mistake of the servant which his wrong doing outside the course of his employment. A mistake induced by the plaintiff himself may be a defence *e. g.*, where, as a practical joke, he leads a policeman to arrest him for a crime which has not committed.

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Green M. R. has observed, "An accident is one out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence." In Pardon Vs. Harcourt Rivington, Lord Dunedin observed, People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities." It means a person is expeeted to exercise reasonable care to avoid happennings resulting in injury to person or property of person or persons. :"If a man carries firearms or drives a horse, his duty is merely to use reasonable care not to do harm to others thereby, and if notwithstanding such care an accident happens he may plead that was due to inevitable accident." To illustrate the above we may take some cases :—

(1) Injury by runaway horses—The defendant's horses were being by his servant on a public Highway. The horses ran away by a barking do and I became so much out of control that the servants could not control them, but could to some extent guide them. The servants tried to control them but the horse remained unmanageable and while running they injured the plaintiff who were at them time on the highway. In this case it was held that no action's was maintainable by the plaintiff for the servant did their best to avoid the accident. The accident was considered inevitable.

(2) In *Hohnes* Vs. *Mather*, a pedestrian while on pavement was injured as the result of the defendants carriage and horses mounting the pavement. If appeared that horses had bolted and the driver was unable to control them. The defendant was held not liable as there was no negligence on the part of the driver.

Q. Is inevitable accident a valid defence to an action in tort ?

Ans. Inevitable Accident whether valid defence—Inevitable accident is, in general a good defence as actions of tort. This is the plea that the damage in question could not have been prevented by the exercise of reasonable care on the part of the defendant. In other words, it is the plea that the conduct of the defendant was neither wilful nor negligent. The defendant while taking help of inevitable accident must prove that there was no negligence on his part.

In *Fardon* Vs. *Harcourt* (1932) 146 L. T. 391, the defendant and his wife, driving a motor car with chauffeur, went Selfridge and parked their car with its back against the pavement and they went in the shop to make purchases.

They were accompanied by a dog, and as to dog no vicious propensities have in slightest degree been proved. They went into the shop, leaving the dog in the closed car, and they stayed a long time and before they came out person, who saw the occurrence said that the dog was in excited state, jumping about and barking. The little window of the car crashed. A fragment of the broken window flew out and went into eye of the pliantiff with the result he lost his eye.

It was held by Lord Dunedin that "this is such an extremely unlikely event that I do not think any reasonable man could be convicted of negligence, if he did not take into account the possibility of such an occurrence and provide against it either by not leaving the dog in the car or by tying it up so that it could not reach the window. In other words, people must guard probabilities but they are bound to guard against fantastic possibilities. The defendants were not held liable.

Problems

Q. 'A' an infant was sent to juvenile instruction centre. He was ordered by the instructor to go to gymansium and take part in the organised game called "rider and horses". During the game, 'A' who was taking the in riding part of horse fell on the horse and sustained a very serious injury to his right arm. 'A' sued for damage. Decide.

Ans. In the above case *A* cannot recover damage. He sustained injury not because of negligence on any body's part. Besides, in physical exercises injury is an inevitable accident.

In *Jones* vs. *London County Council* an infant boy was injured while playing the game of "rider and horses" during the game the boy fell on the ground and sustained a very serious injury to his right arm.

Scrution L. J. said that the plaintiff had undoubtedly suffered serious injuries but it did not follow that he was entitled to compensation. To be entitled he must show some breach of legal duty. The evidence of the instructor was to the effect that he had seen the game of 'riders and horses' played on a wood floor and also on grass without a serious accident. When a game had been played for twenty years without any serious injury, could it be said to constitute negligence to allow that game to be played. There could hardly be any physical exercise in which an accident might not happen. The Appeal failed.

Q. 'B' was a member of a shooting party and fired at birds. One of the pellets from his gun gone through the bough of a tree and accidently wounded the plaintiff who was engaged in carrying cartridges and game for the party. Decide

Ans. The plaintiff was injured without any negligence and malice on the part of defendant.

In *Stanely* Vs. *Powell*, the plaintiff who received injury by one of the pellets glanced off the brough of a tree and he sued in respect of an injury owing to the negligence of defendant. There was no ground for saying that it was intentional, so far any injury to the plaintiff is concerned. The jury negatived negligence. It was held by the court that the defendant was not liable.

Q. 'A' and 'B' are travelling in a bus. A takes permission to take a glass of water from B's water pot. While he is pouring water into glass the pot strikes against a box and breaks. 'B' claims damages caussd to valuable clothes of his in the box by the water flowing from the broken pot. Could 'B' succeed in claiming damages ?

Ans. *A* can defend himself by taking the plea of invitable accident. An inevitable accident is that which a man of reason and prudence could not foresee and fails to take any action to prevent its occurence. Two points are clear in this case. Firstly that act was not unauthorised and secondly there is nothing to show that there has been any negligence or any deliberate intention on the Part of *A* which might have contributed, in any way, to the breaking of the water pot and the damage resulting from the valuable clothes of *B* contained in the Box.

The case will be fail and *B* cannot recover damages.

Q. Distiuguish between 'inevitable accident' and 'mistake'. How far is mistake, defence to an action of tort ?

Ans. Distinction between Inevitable Accident And Mistake— In mistake, the defendant intentionally does the act that which constitutes the tort. But he pleads ignorance. He says act was done in the belief that it would not amount to any wrong. Where *A* does an act which he thinks is not tortious and is not breach of duty, he pleads ignorance and says he did it by mistake.

In inevitable accidents defendant has no hand in the occurrence. He cannot prevent it. Human element is involved but its prevention is beyond the control of human being. In inevitable accident the effect is not intended.

Mistake is, in general, no defence. Any act of wilful interference with the property, person, reputation, liberty or other right of another on a supposed justification is done at the doer's peril, and if the justification does not in truth exist, at belief in its existence, however, honest and reasonable, is no defence. It makes no difference whether the mistake is one of fact or one of law. There is a wellknown saying that ignorance of law has no excuse. If a man takes the goods of another thinking that they are his own, or trespassec on another's land erroneously believing that there is a right of way, he is liable for the wrongful act he has done, and it is no excuse that he believed that he had right to do the act complained of. In criminal law good faith is often a defence.

There are, however, certain exceptions to the rule that mistake is no defence. In false imprisonment the reasonable belief that the defendant has a right to arrest the plainiff is often a defence. It deceit mistake is a defence.

On the other hand inevitable accident is a good defence to actions of tort. This the plea that the damage in question could not have been prevented by the exercise of a reasnnable care on the part of defendant.

Inevitable accident is a good defence but it is not a defence to every tort. For example, in actions of libel or in cases of escape of dangerous things from land, inevitable accidenot is not a good defence.

Q. Explain and Illustrate the following:—

(a) *Novus actus interveniens* ;

(b) Contributory negligence.

Ans. (a) *Novus actus intervemens*—This plea is generally taken by the defendant in rescus cases. The defendant pleads that he should not be held liable for the intervention of new act. It means where the plaintiff jumps into peril with his own accord and receives injuries, the defendant should not be held liable for his negligent act. The question arises where *A* receives injury in rescuing *B* from an emergency created by the negligence of *C*, *A*'s conduct is a *novus actus intervnieens* which makes his injury too remote a consequence of *C*'s initial negligence. In such a case *C* cannot absolve himself from the responsibility and he will have to pay the damage.

In *Haynes* Vs. *Harwood* where the policeman was injured while seizing the horses which were left by the defendant's servant on a street, the defendant was held liable for negligence. The policeman's act was that of a normally courageous man in the like circumstances, and therefore, was both the direct and foreseeable consequence of the defendant's unlawful act ; hence the injury he sustained was not too remote. "The reasonable man here must be endowed with qualities of energy and courage, and he is not to be deprived of a remedy because he has in a marked degree a desire to save human life when in peril.

Even his duty to intervene was moral one still according to Maugham L. J. "the law does not think so meam of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some ablebodied person should expose himself to the same danger to effect rescue."

This, however, would not cover the case where any person takes the risk in an attempt to stop a runaway horse on a desolate country road. There no question arises of rescuing human life and it would amount to *novus actus interveniens*. The injured man cannot recover damages from defendant.

(b) Contributory negeligence—It is a defence pleaded by the defendant in cases of tort. Where plaintiff knowingly takes the risk of encountering danger resulting from the negligence of defendant, the plea of contributory negligence is advanced on behalf of the defendant. But the contributory negligence does not negative the liability defendant altogether. The defendant may be required to pay the proportion of damages sustained by the plaintiff.

If the plaintiff's injuries have been caused partly by the negligence of defendant and partly by his own negligence, then, at common law, the plaintiff can recover nothing. This rule of contributory negligence first appeared at the beginning of the nineteenth century, though the general idea is traceable much earlier.

In *Butterfield* Vs. *Forrester*, (1809) 11 East Co, *A* wrongfully obstructed a road by putting a pole across it. *B*, riding violently on the road in the dusk, was overthrown by the pole and injured. The pole was discernible at a distance of 100 yards. It was held that *A* was not liable to *B*. Bayley J. said, "If he had used ordinary care he must have seen the obstruction ; so that the accident appeared to happen entirely from his own fault." Load Ellenborough C. J. added "one person being at fault will not dispense with another's using ordinary care of himself."

The common law rule produced hardship where one of the two parties suffered the greater loss although his neglige- nce was not the major cause of the accident. Accordingly the courts modified the defence of contributory negligence by the so-called rule of last opportuniny. This enabled the plaintiff to recover despite his own negligence, if the defendant on the occasion of accident could have avoided the peril while the plaintiff not. The extension of the rule of "constructive last opportunity" created further confusion. This meant that if the defendant would have had the last opportunity but for his own negligence, he was in the position as if he had actually had it, and the plaintiff again recovered in full.

The rule of 'last opportunity' proved to be illogical. Then came the rule of apportionment of damages between plaintiff and defendant. In *Admiralty Commissioner* Vs. *S. S. Volute*, the House of Lords held that even where the defendents negligence is subsequent to that of the plaintiff, nevertheless the plaintiff's negligence is still contributory to the collision if there is not "a sufficient separation of time, place or cirumstances" between the plaintiff's negligence and the defendant's negligence to make the defendant's negligence the sole cause of the collision.

The Law Reform (Contributory Negligence) Act, 1945, applies to the principle on which the Maritime Convention Act, 1911 was based to contributory negligence on land and today, therefore, the damages may be apportioned wherever both parties have been negligent and both have contributed to the damage.

Section 1 (1) of the Act of 1945 provides as follows :—

"Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person and persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage. But the damage recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

In *Dawrant* Vs. *Nutt*, (1961) I. W. L. R. 253, where the plaintiff was a passenger in her husband's Motor Cycle combination and was injured in a collision which was partly caused by the defendant's negligence, Stable J. held that the plaintiff had been guilty of contributory negligence in knowingly travelling in the unilluminated combination, he awarded the plaintiff a proportion of the damage.

Q. (a) Define Act of God (Vis Major).

(b) 'A' is the owner of a piece of land. Contiguous to it there is Estate of 'B' containing three lakes of ornamental water. These lakes are fed by natural stream passing through the estate. A heavy rainfall caused the lakes to overflow their banks flooded the river and four country bridges swept away, 'A' sues 'B' for damage. Decide.

Ans. (a) Vis Major—Vis Major (Act of God) has been defined by Polloak in the following words :—

"It is an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it." In its wider meaning it means that "any event which could not have been prevented by reasonable care on the part of any one." In fact act of God amounts to interference in the course of nature that is so unexpected that any consequences arising from it must be regarded as too remote to be foundation for legal liability. It is an irresistible and unsearcheble providence nullifying all human efforts.

In *Nugent* Vs. *Smith, james*, L. J. defined act of God "As mere short way of expressing this proposition. A common carried is not liable for any accidents as to which he can show that it is due to natural cases directly and exclusively without human intervention, and that it would have been prevented by any amount of foresight and pains and care reasonably to have been expected from him."

(b) In the present case *A* shall not be liable and, as such, *B* cannot recover damage from him. The lakes overflowed their banks due to heavy rainfall which was beyond the control of *B* and thus it was an act of God. It was not due to human intervention. *B* was not negligent.

In *Nichols* Vs. *Marsland*, the plaintiff was surveyor of country bridges for Cheshire. The defendant, was an owner of an estate containing lakes of ornamental water fed by natural stream passing through the estate. A very heavy fall of rain caused the lakes to overflow their bankes, flood the rivers and carry away four country bridges.

The plaintiff claimed compensation for the loss of bridges. It was found that the defendant was not negligent and the overflow of lakes was due to Vis Major. The Court of exchequer made the rule absolute *i. e.*, gave the judgment for defendant.

In *Mannindra Nath* Vs. *Mathura Das*, an action was brought for damages for injury caused to the plaintiff by the fall from the roof of the defendant's premises, of a cinema advertising device made of cloth within a wooden frame. Ii was contended by the defendant (proprietor of a motion picture) that the fall of the device was caused by storm of unusual severity.

It was held that in the town of Calcutta during the monsoon season stormy whether is not unusual and storms of cosiderable severity are by no means unprecedented. Therefore, a gust of a wind with a velocity of less than 27 miles per hour in the town of Calcutta during the monsoon season cannot be said to be so unexpected that no human foresight could reasonably be expected to antiyipate it and cannot be regarded as Vis Major or act of God.

Q. Distinguish between inevitable accident and act of ~~Gop~~ Good (Vis Major).

Q. What do you understand by inevitable accident ? How does it differ from act of god. ? (L. U. 1978)

Ans. **Distinction Between inevitable Accident and Act of God**—An accident is an act of God when it resulted directly from natural causes without human intervention. It means that in an act of God human being has no part of play. *Winfield* is of opinion that act of God is much older, much simpler and much mere easlly grasped by primitive people that is the idea of inevitable accident. A falling tree, a flash of lightening or a flood presents to the observer a simple and dramatic fact which the variest child or lay man would regard as an excuse for harm done without further argument, but the accidents which are not convulsions of nature are a very different matter. Inevitable accident differs from act of God in (i) not depending on "Natural forces." (ii) being a general defence.

In *Makin Ltd.* Vs. *L. N. E. Ry.*, (1943) K. B. 467, the defendants are the owners of a canal which crosses vally at the top of a high embankment. On June 22, 1941, as the result of the violent storm, the embankment eollapsed, and great quantity of water escaped from the canal into the stream below and was carried down to the plaintiff's mill where it was deposited together with a large number of stones. The canal was constructed in persuance of the powers conferred on the proprietors by the Peak Forest Canal Act, 1794, Section 15, which imposed liability for injury caused by water flowing from cannal or "from any other aceident."

The plaintiff in claiming damages, said that the Act imposed an absolute liability on the defendants irrespective of negligence. The defendant contended that the construction of earlier words of Section 15 of the Act must be governed by the succeeding phrase "or from any other accident" that liability was, therefore, limited, to an escape due to accident and that an escape of water due to an act of God was within Section.

It was held that Act of 1794 imposed liability for damages on the defendants even if such damage was caused by an act of God.

An act of God is defined in Webster's International Dictionary as follows :—

"An inevitable accident is such an extraordinary interruption of the usual course of event as is not looked for in advance and against which ordinary prudence could not guard.

Q. In some cases even damage intentionally done may not involve the defendant in liability when he is acting under necessity to prevent a greater evil. Comment.

Ans. **Necessity to Prevent a Greater Evil**—Necessity is a ground which negatives liability in tort. Where *A* acts out of necessity to prevent some loss and damage is done he will not be liable in tort. Necessity provides, that the occassion of necessity does not arise from the defendant's own negligence. Any peril is caused by the negligence of *A* then he cannot suceessful plead that the damage occurred while he was acting out of necessity.

In the case of necessity even if damage is intentionally done may not involve defendant in liability when he is acting to prevent a greater loss. Where the defendant destroys a building made ruinous by fire to prevent its collapse on the highway, he cannot be held liable (*Dewey* Vs. *White*). Similarly if fire is broken out in one house and the house which caught fire is pulled down to prevent the spread of fire to other property, no one would be held liable. As in such a case the house was pulled down to avoid greater damage.

In *Cape* Vs. *Sharpey*, (1912) K. B. 496, a fire broke out on *A*'s land while *A*'s servant was trying to beat it out, the game-keeper of *C* (who had shooting right over *A*'s land) set fire to Strips of heather between the fire and some nesting peasants of *C*. Shortly afterwards *A*'s servant sueceeded in extinguishing the fire. *A* sued the game keeper for trespass. He was held not liable for there was real and imminent danger to the games at the moment at which he acted, and what he did was reasonably necessary.

For the defence of necessity, the measures which are taken must be reasonable, and this will depend amongst other things, upon whether there is human life or merely property in danger.

In *Krik* Vs. *Gregory*, *X* died in state of delerium tremens. His servants were feasting and drinking in the house. *X*'s sister-in-law removed *X*'s jweller from the room where he lay dead another room for safety's sake. Some unknown person stole it. The sister-in-law was held liable to *X*'s executor for trespass to the jewellery because there was proof that her interference was reasonably necessary.

From the above case it would be seen that the defence of necessity can be successfully pleaded only when human life is in danger, and also which greater loss is prevented at the cost of smaller loss.

CHAPTER IV

REMOTENESS OF DAMAGE

Q. Trace the development of the law relating to "remoteness of damage" through leading cases. (L. U. 1978)

Or

Discuss fully the law relating to remoteness of damage.

Ans. Remoteness of Damage—In the earlier times the courts took refuge in the generalisation that "he that does the firstwrong shall answer all consequential damages" or damage must be the legal and natural consequence of the wrongful act

This could be seen in *Scott* Vs. *Shephered.* In this case the defendant threw a lighted squib into a crowded market house. It fell upon the ginger bread stall of Years. One, Willis, instantly, and to prevent injury to himself and to the wares of Yates' picked up the squib and threw it across the market house. It fell upon, the stall of Royal, who instantly, and to save his goods, threw the squib to another part of the market house where it borst and put out the plaintiff's eye. The plaintiff sued the defendant for assault. The court held that the defendant was liable.

It was observed that the natural and probable consequence of the done by the defendant was injury to somebody, and therefore, the act was illegal at common law.

Further it was observed that the defendant may be considered in the same view as he himself had personally thrown the squib in the plaintiff case. *De Grey*; *C. J.* observed that the true question is, whether the injury is the direct and immediate act of the defendant, and I am of opinion that in this case it is.

Upto 1921 two views prevailed (i) conseqnences are too remote if a reasonable man would not have foreseen them, and (ii) if a reasonable man would have foreseen only damage as likely to result from his act, then he is liable for all direct consequences of it, whether a reasonable man would have foreseen them or not. The former came to be known as foreseeability test and the latter as direct test of remoteness of damage.

According to the second test in another view reasonable foresight is relevant to the question ; "was there any legal duty owed by the defendant to the plaintiff to take care ?" It is irrelevant to the question. "If the defendant broke a legal duty was the consequence of this breach too remote ?" What ought to have been reasonably contemplated "goes to culpability, not to compensation.

The authority of the second view i. e., test of directness of consequences began with the decisions in *Smith* Vs. *L. S. W. Rly.*, (1870) L. R. G. In a very dry summer, the railway company's servant cut the grass and timmed the hedges bordering the railway line. He left the trimming and cuttings in heaps between the line and the hedge for fortnight. A fire, caused by the sparks from railway engine, ignited these heaps and spread to a stubble field beyond the hedges. Thence a high wind carried it across a road to the plaintiff's cottage, situated 200 yards from the spot where the fire began. The cottage was burned. The Court of Exchequer Chamber held the Company liable.

In 1921, the above case was followed in Re Polmis and Furness. Withy and Co. Ltd. The case is well-known as Re Polmis. In this case Furness, Withy & Co. chartered from Polmis a ship and loaded among her cargo some cases of benzine and petrol. During the voyage the tins leaked and thus there was a good deal of vapour in the hold. At a post of call Stevedores, who were the servants of the Charter, negligently dropped a plack into the hold while they were shifting the cargo. A rush of flames at once followed and the ship was totally destroyed. The fire exception clause did not provide that in covered negligence on the part of servants. And as the tall of the plank was due to servant for whome they were responsible, the Charters were liable for all direct consequences of the negligence, even though they could not have been reasonably anticipated. The Charters were held liable for the less 2,00,000 Pounds. On appeal the court of appeal dismissed it.

In Re Polmis itself as well as in the earlier case of *Smith Vs.L. S. S. W. Rly.* there are passages which seem to suggest that once an act has been found to be negligent in the sense the injury to some one is foreseeable, then any person directly injured by it can recover even though it is unforseeable that he might suffer damages in any way.

This case was criticised extra judicially. The case, however, would clearly conflict with the basic principle that before liability in negligence can exist there must be a breach of duty owed to the plaintiff. If it was not reasonably foreseeable that the defendant's act of omission would lead to any damage to the plaintiff then there is no initial liability.

The Liebosch—Re Polmis attracted the attention of the House of Lords when in 1933 while deciding the Liebosch case they put an interpretaiion on Re Polmis which limits its scope.

In *Liebosch Dredger* Vs. *Edision S. S.*, by negligent navigation of Edison, the dredger Liebosch fouled and sank. The owners of the Liebosch were under a contract with a third party to complete a piece of work within a given time. They were put to much greater expense in fulfilling this contract because they were too poor to buy a substitute for dredger. They sued the owners of Edison for negligence.

House of Lords held that they could recover as damages the market price of dredger comparable to the Liebosch and compensation for loss in carrying out the contract between the sinking of the Liebosch and the date on which the substituted dredger could reasonably have been available for work for the measure of damage in such cases is the value of the ship to her owner as a going concern at the time and place of the loss, and in assessing that value regard must naturally be paid to her pending engagements.

The claim for extra expenses due to poverty was rejected because the plaintiff's want of means was an extraneous matter which rendered this special loss too remote.

In *Jhurogood Vs. vanden Berghs and Jurgens*, (1951) K. B. 537, Asquith J. points out that directness of causation, and not foreseeability of damages, is the test when, negligence having been found, remoteness of damage is being considered. "The actual damage may be wholly different in character, magnitude or in the detailed manner of its incidence, from anything which could reasonably, have been anticipated.

The Wagon Mound—In *Overseas Tank Ship (V. K.) Ltd.* Vs. *Morts Dock and Engineering Co. Ltd.*, (1961) A. C. 388, which came to be known as Wagon Mound case, the judicial committee of the Privy Council, through Viscount Simond, expressed its unqualified disapproval of Re Polmis and refused to follow it.

The facts of the Wagon Mound's case were as follows :— O. T. Ltd. were charters by demise of the Wagon Mound, an oil burning vessel which was harboured at C oil Co.'s wharf in Sydney harbour for the purpose of taking on fuel oil. Owing to the carelessness of O. T. Ltd.'s servant a large quantity of fuel oil was slipt on the water, and after a few hours this had spread to Morts Dock Ltd., wharf about 6000 ft, away, where another ship, the Corrimal was under repair. Welding operations were being carried out on the Corrimal, but when the M. D. Ltd.'s manager became aware of the presence of the oil he stopped the welding operation and inquired of the C. Oil Co. whether they might be safetly continued. Because of the belief that oil is not inflammable of fuel oil in the open, he gave instructions for the continuance of welding operation. All precautions were taken to prevent inflamable material from falling into oil. Two days later the oil caught fire and extensive damage was done to M. D. Ltd.'s wharf.

In the above case two findings of the fact are important (a) it was unforeseeable that fuel oil spread on water would catch fire (b) some foreseeable damage was caused to M. D. Ltd.'s wharf from the spillage of the oil in that the oil had got into the spilways and interfered with their use. The case was, therefore, dealt with on the ground that there was a breach of duty and direct damage, but that the damage caused was unforeseeable. The full court of the Supreme Court of New South Wales, it was held following Re Polmis, that O. T. Ltd. were liable.

The Privy Council reversed the decision and held that Re Polmis should no longer be regarded as good law. "It is foresight of the reasonable man which alone can determine the responsibility. It was observed that *Re Polmis* rule of "direct consequence" in place of reasonable foreseeability is illogical and unjust.

Q. Distinguish between private defence and necessity. Illustrate the rule that necessity negatives liability in tort.

Ans. Private defence and necessity distinguished—In the case of private defence the plaintiff actually either actually threatens to do something or does something against the plaintiff's person or property, whereas in the case of necessity the harm inflicted on the plaintiff is not provoked by an actual or threatened wrong on the plaintiff's part and that what the defendant did may be entirely for the good of others not necessarily for the protection of himself or his property. This may be explained by means of an illustration. Suppose a fire breaks out in a certain vanity and it becomes necessary to pull down certain houses to prevent the spread of fire to the adjoining buildings, the pullings down of buildings would be a necessity. In such cases where things are done when warranted by necessity the doer of the act is not held liable for the act. This is bases on the legal principle embodied in the maxim salus populi Suprema lex which means the welfare of the people is supreme law. Many examples can be quoted in which injury to private property is done to save masses from inpending danger. For example private houses are pulled down or bulwork is raised on private property for the preservation of the defence of the kingdom against the kings enemies or houses are pulled down to stop the spread of fire or goods are cast overboard to save a ship from sinking and thereby saving the lives of those on board. But it should be noted that the doctrine of necessity is confined within very narrow limits eg. urgent and transient situation of great imminent danger to life in which law permits some encroachment on the private property.

CHAPTER V

NERVOUS SHOCK

Q. "The crude view that law should take cognizance only of physical injury resulting from actual damage has been discarded." Comment.

Ans. **Injury By Shock**—It is now recognised that an action will lie for an injury by shock sustained through the medium of the eye or the ear without direct contract. The distinction between mental shock and bodily injury was never a scientific one. The mental shock is presumably in all cases the result of, or least accompained by, some physical disturbances in the sufferer's system.

Earlier it was supposed that "bodily" or "physical" injury exclude "mental" injury as being too remote. The damage would be rewarded where damage was done because of mental shock without any contract.

In *R.* Vs. *Miller* it was observed that damages cannot be given for mere sensation of fear or mental distress, but when fear or any other sentation produces a definite illiness, that consequence is no more remote than a broken bone or an open wound. It was held that neverous shock constituted "actual bodily harm" for the purposes of criminal law.

Once on the realisation of the fact that true neverous shock is as much a physical injury as a broken bone or a torn flesh wound, it becomes clear that ordinary principles of liability for personal injury will apply.

"In the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to precise scope of legal liability.

In a number of cases it has been recognised that defendant shall be held liable for causing nervous shock to plaintiff. Nervous shock has now become as good cause of action in tort as physical injury. Where the shock is the result of intentional wrongful act there is no difficulty in making the defendant liable.

In *Dulieu* Vs. *White*, (1901) K. B. 669, the plaintiff a pregnant woman, was behind the bar of her husband's public house when the defendant's servant so negligently drove a pair of horse van as to drive it into the public house. The plaintiff was not physically injured but she suffered shock which resulted in serious illness and the premature birth of child. It was held that on these facts the plaintiff was entitled to recover.

Problems

Q. (a) Due to negligence of 'X' his unattended lorry started to run violenty down a steep and narrow 'Y' saw it coming and was terrified for the safety of her children from whom she had just parted and who had turned a bend in the street out of her sight. By standers told her immediately afterwards that a child answering to the description of one of her own had been injured 'Y' sustained a nervous shock and died in consequence.

Would 'X' be liable to pay damage for the death of 'Y' ?

(b) The defendant backed his taxi cab into small boy on tricycle, injuring him slightly. The child screamed causing his mother in a house nearly to look out. She saw the tricycle under the taxi cab but could not see the child. She was shocked and illness resulted. She sues on her own behalf and on behalf of the child. Decide with reference the cases you know.

Ans. (a) In the present case *X* would be liable to pay the damages. *Y* received nervous shock when she came to know the child of the description of her own has been injured. The accident occurred due to the negligence of *X* who left his lorry unattended. Nervous shock is good cause for recovery of damages and *X* shall be liable.

The restriction imposed by Kennedy J., that shock must have been due to fear of one's own personal safety. The limitation was rejected by a majority of the court of appeal in *Hombrook* Vs. *Strokes Bras.*, (1925) I. K. D, 141. In this case by the negligence of Strokes, his unattended lorry ran violently down a narrow and steep street. The lady terrified about the safety of her own children came to known that a child of the description of her own has been injured. She sustained nervous shock and died in consequence.

It was held that *S* was liable for her death. There was admission of negligence in the pleading which meant that the breach of a duty owed to Hambrook was admitted by Strokes.

(b) In this case mother cannot recover damages from the defendants as he owed no duty to mother. The taxi cab driver owed duty to boy and for the breach of this duty he was liable to the boy.

In *King* Vs. *Philips*, (1953) I. Q. B. 429, the defendant's taxi cab, driven by his servant, was negligently backed into a small boy on a tricycle and slightly damaged both. The boy's mother heard his scream and looking out of an upstair window some seventy yards away, saw the tricyle under the cab but could not see the boy. She suffered a shock as a result, but the Court of Appeal held that although taxi cab driver was in breach of a duty of care he owed to the boy the mother could not recover. They reached to the conclusion on the ground that the driver owed no duty to the mother.

Q. "The modern concept of liability in negligence has resulted in a shift of emphasis from remoteness level to duty level, as it has been appreciated that the test of foreseeablity of risk affords the only practical solution to the causations problems.

Discuss the above statement with reference to liability for nervous shock.

Ans. Liability in Negligence—In *Bourhill* Vs. *Young and King* Vs. *Philips* it was observed that the problem in nervous shock is one of duty and not of remoteness. Duty, it is agreed depends upon foreseeability. Singleton L. J. accepted and agreed with the finding in *King* Vs. *Philips* that on the facts no reasonable driver on imaginary by stander would anticipated damage of any king to the plaintiff. Denning J. also held that foreseeability of emotional injury is sufficient and, indeed, went so far to say that the test adopted in *Bourhill* Vs. *Young* was no foreseeability of physical injury, but foreseeability of emotional shock. In *King* Vs. *Philips* the damage suffered by the plaintiff was to-remote for the slow backing of the taxi cab was very different from the terrifying descent of the runaway lorry. The taxi cab driver cannot be reasonably expected to have seen seventy yards away, whereas the lorry driver ought to have seen that a runaway lorry might seriously shock the mother of children in the danger area.

It has now been established that the courts can almost base any conclusion on a finding that shock was or was not forseeable in the circumstance.

Liability for nervous shock—The law in respect of nervous shock may be summarised as fellows :—

1. If it was not reasonably forseeable that the plaintiff would suffer injury of any kind as a result of the defendent's negligent act, then he cannot recover.

2. If it was reasonably forseeable that the plaintiff would suffer nervous shock as a result of the plaintiff's negligence, but only by being informed of it after the event, then again he cannot recover *Hombrook Strokes*.

3. If it was reasonable that a normally susceptible person placed in the plaintiff's position would have suffered nervous shock from what he observed by his own senses as a result of the defendant's negligence, or if the particular susceptibility to shock of the plaintiff was known to the defendant, then probably the defendant, can recover.

4. If it was reasonably forseeable that the plaintiff would suffer physical injury as a result of the defendant's negligence *i. e.*, if he

himself was placed in the danger of physical injury, then probably he can recover even though he suffers only nervous shock.

5. If the plaintiff suffers shock through reasonable fear for his own safety as a result of the defendant's negligence, than he can certainly recover.

In all the above propositions it is presumed that the defendant failed to exercise due care and that the damage was on general principles, too remote. In short, if the ordinary principles of liability in negligence indicate that the plaintiff has no cause of action, then he can no more recover for nervous shock than for any other injury.

Q. Write a brief note on mantal and nervous shock. How far it is true that an action will lie for injury by shock sustained by the plaintiff.

Ans—By the work shock mental shock is meant. By the expression mental shock we mean shock to the moral or intellectual sense. By nervous shock we mean a "shock to the nerve and brain structure of the body."

An action lies, in tort, for injury by shock sustained through the medium of eyes or ears without direct contact. In Dulien Vs. white & sons as also in Wilkinson Vs. Downton it was held that damages which result from a nervous shock accasioned by fright though unaccompanied by any actual impact, may be recovered in an action for negligence. It is not always necessary that the nervous shock must be a shock arising from a reasonable fear for immediate personal injury to onself. "Osborn has stated, that nervous shock means injury to health due to nervous shock means a form of bodily harm for which damages may be claimed. But the defendant to be liable must owe a duty to the plaintiff to take care with respect to him, and the fact that the defendant would suffer injury from nervous shock as a result of the defendants act must have been reasonably foreseeable by him i. e. the plaintiff must have been within the area of potential danger. —(Bournhill Vs. Young [1943] A. C. 92).

Shock where reasonably foreseeable will give rise to a claim for damages even though it is not caused by fear of injury to oneself or to ones children.

In the case of Dooley Vs. Commel Laurd & Co. *the plaintiff* who was a driver of a crame, suffered nervous shock when he saw that by the breaking of the rope of the crane its load fell into the hold of a ship where some men were working. The rope has broken due to the negligent act of the defendant and they were held liable to the plaintiff. Similarly in the case of Owens Vs. Liverpool Corporation the Court of Appeal allowed the plaintiff's action for nervous shock which resulted not because of any danger to human life but by the imperilment of a coffin containing the corpre of a near relative. In this case possibility of the mourners, present there, at that time, was held to be no defence. It was held, "One who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him, it is no answer to claim for a fractured skull that its owners had an unusually fragile one."

In the end it may be stated that "for the purpose of an action for nervous shock a person need not be in the area of physical injury to himself it is enough that he is so placed that a shock could be caused to him by his seeing or hearing something".

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CHAPTER VI

CAPACITY TO SUE AND BE SUED

Q. Discuss the capacity to sue and to be sued of the following in an action for tort.

(*a*) *The Government of Uttar Pradesh.*
(*b*) *A married woman.*
(*c*) *Foreign Sovereign.*
(*d*) *Ambassadors.*
(*e*) *Bankrupts.*
(*f*) *Corporations.*

Ans. (a) The Government of Uttar Pradesh—In *State of Rajasthan* Vs. *Mst. Vidhyawati* A. I. R., 1952-68, the driver of a Government jeep, Lokumal, drove it rashly and negligently, while bringing it back from the workshop after repairs. The jeep knocked down a pedestrian and injured him. The injured person was removed to the hospital where he died after three days.

It was held by the Supreme Court that the State Government is vicariously liable for the tortious acts of its servants, like any other employer.

In this case the position of State liability was discussed and article 300 (i) of the Constitution was interpreted. The article runs as follows :—

> "The Government of India may sue or be sued by the name of the Union of India and the Government of a

> State may sue or be sued by the name of the state and may subject to any provision which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

It is clear from the above that position of the States in respect of liability shall be determined according to the law prevalent before the Constitution of India came into being. In *Peninsular and Oriental Steam Navigation Co.* Vs. *Secretary of State for India*, the court after the examination of rules then existing pronounced the judgment that "The Secretary of State in Council of India is liable for the damages occassioned by the negligence of the servant in the service of Government if the negligence is such as would render an ordinary employer liable". 3

Therefore, it is clear that Government of Uttar Pradesh can be sued and it can sue as well. Article 300 has itself saved the right of State Legislature to enact such law in this connection. But since no law is enacted upto the present moment to express its intention to the contrary, the State shall be held liable.

(b) A married woman—In law of tort a married woman could not sue or be sued unless her husband was joined with her. This rule was upheld by a bare majority of the *House of Lord in Edward* Vs. *Poster* (1925) *A. C. I.*

The rule existed at common law long before 1882, and at a time when husband was supposed to be his wife's guardian and acquired all her property. It was unfair. But when she had become partically independent it was an archaic anomaly. The result was that it might well be less expensive for a man to keep dog with a savage temper than to marry a wife with a venomous tongue, he could kill the animal he could not even lock up the woman and while he was not liable for the dog's bite unless he knew of its evil disposition, ignorance of his wife's vice was no excuse.

The Act of 1882 (Married Woman's Property Act, 1882) has abolished this procedural necessity and now she may sue or be sued but she was only liable not beyond her separate property. At present the Law Reform (Married Woman and Tort Feasors) Act, 1935 obolished the word separate and puts mareied woman in almost exactly in the same position as their unmarried sisters. Section 3 and 4 provided that the husband of a marrird woman shall not by any reason only of his being her husband, be liable in respect of any tort committed by her whether before or after marriage, or to be sued of made a party, to any legal proceeding brought, in respect of any such tort, but he may of course, be liable as joint tort feasor with his wife if in fact he was one.

(c) **Foreign Sovereign**—A foreign sovereign is not liable in English law courts for any tort committed by him. He is only liable when he has waived his immunity. "The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceeding involves process against his person or seeks to recover from him specific property or damages".

(d) **Ambassador**—An ambassador exercising diplomatic function cannot be sued during his term of office for any tort according to the provision of the Diplomate Privileges Act, 1700.

(e) **Bankrupt**—A bankrupt does not enjoy special position as regards tort committed by him. He can sue and can be sued.

(f) **Corporations**—A corporation is an artificial person. Since corporation is a fictitious person, it is distinct in law from its members, and is not capable of acting is *propria persona* but acts only though its agents and servants.

Capacity to sue—A rorporation can sue for the tort committed against it. However, there are certain torts which cannot be committed against corporation. They are assault and personal defamation and, as such corporation is unable to sue in these matters.

Liability to be sued

(i) **Intra vires tort**—Corporation are liable to be sued for torts committed by their agents, to the same extent to which an individual is liable for the torts of his agent provided that the act is with the corporate power. Corporations are thus responsible for the torts authorised or ratified by them or committed by the agent within the scope of his employment. At one time it was though that in certain torts mental element is necessary and the corporation, being a fictitious person, is unable to commit that tort, but now it is settled that corporation can be sued even for that wrong which involves fraud or malice

(ii) **Ultra vires Torts**—It is generally said that a corporation is liable only for the torts committed by its agents or servants if they are within the scope or power of the corporation and if it is beyond the limit and is *ultra vires* then, no authority to the servant or agent to commit such a tort can be implied.

In *paulton* Vs. *London S. S. W. Rly.* (1867) L. R. 2. Q. B. 534. a railway company had statutory authority to arrest passengers for non-payment of their fares but not for other reasons. The defendant station master wrongfully detained the plaintiff because he refused to pay the fare of his horse. It is to be noticed that the power to detain in such circumstances the railway company was not responsible for the act of the Station Master in arresting a passenger for refusing to pay of the freight payable for a horse.

The implied authority of the Station Master does not extend to the things of the acts which are *ultra vires* of the company, and that he acted beyond the scope of employment.

Q. What do you understand by act of State ? Illustrate it with the help of decided cases as defence in tort.

Ans. Act of State—The Act of State has several meaning. It may signify—

(i) an act that on its face injures no body e. g., recognition by one government of a foreign sovereign ; (is) an act done by a foreign State within its territorial jurisdiction which injures a subject of another country ; this gives no right of action to the subject whatever may be its aspect in International Law ; (iii) a transaction between one government and another State that injures the subject of one state ; (iv) Wade defined it as "an act of the executive, as a matter of policy performed in the course of its raeltion with another State, unless they are temporarily with the allegiance of the crown" ; (v) According to Stephen, "it is an act injurious to the person or to the property of some person who is not at the time of that act a subject of (His) Majesty" ; authority, civil or military and is either previously sanetioned or subsequently ratified by His Majestey.

In this last sense the case cited for it is *Buron* Vs. *Denman.* In this case plaintiff a Spaniard, owed some slaves and slave baracoons on the west coast of Africa outside British dominion. The defendant a captain in the Royal Indian Navy, cleared the slaves and set fire to the baracoons. He had no authority to do so but his act ratified by the crown and the admiralty in congratulating on his "spirited and able conduct" granted him 4,000 Pounds.

In every civilised country the sovereign reserves to itself certain powers and through them it can interfere with the person and the property of others and cannot be challenged by the courts of the country. That an act in order that it may not be subject to judicial cognizance, must be the act of the party acting in the sovereign right appear to be well established in (i) *Gibbon* Vs *East India Company* and in *Ex Raja of Coorg* Vs. *East India Company*. But a corporation thought it may be vested with sovereign powres cannot be exempted from judicial prob. Peacock J. laid down the following rule in this connection in *P. O. Co* . Vs. *Secretary of State.*

"Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie."

Thus it may be concluded that (i) the act of State of which the municipal courts are debarred from taking cognizance, are acts done in the exercise of sovereign powers and (ii) where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the soverign powers and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil courts.

An act of State is not confined to the seizure of person as well. This point is illustrated by the case *In re* Maharaja, Madhaw Singh. In this case Maharaja of Puna was suspected to have poisoned his uncle. Viceroy ordered Maharaja's deportation. On appeal by Maharaja, the Privy Council held that the act of Viceroy was an act of State.

Problem

Q. (A). a Magistrate, in allowing the prosecutor to withdraw a charge, said that he regarded the charge as gross attempt blackmail and that if the prosecutor found himself in goal for twelve mouths it would possible do him good. The prosecutor sues tne Magistrate for slander. Is the action maintainable ? Discuss.

Ans. In the case of the act of State, no action can be taken against the official who perform it legally. Similarily, judicial officers enjoy general immunity. In England it is well established that no action lies against a judge of a superior court in respect of any act done by him in his judicial capacity even though he acts oppressively, maliciously and corruptly. And no action lies against judge of an inferior court in respect of any act done by him within his jurisdiction. In India, the Judicial Officers' Protection Act enacts "No judge, magistrate, collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his jursidiction, provided he at the time, in good faith, believed himself to have jursidiction to do or order the act complained of."

In above case, *A*, the magistrate is not liable. *In Law* Vs. *Llewellyn*, (1906) I. K. B. 487, where the magistrate passed such remark and was sued for slander, it was held that no action of slander or libel lies whether against judges, counsel for words written or spoken in the ordinary course of proceeding before any court or tribunal recognised by law.

Q. Can minor be sued or sue for an action in tort ?

Ans. Minor whether he can be sued—A minor is not exempted from liability in law of tort. A child of any age may be sued for tresspass to land and conversion and will be liable in damager like the adult. But, however, a question will certainly arise in fixing liability if he had malice or specsal intent which is sometime negligence. It would be perhaps not irrelevant to inquire whether he showed that much of reasonableness which is expected from a child of that age. In *Hodsman* Vs. *Grissel* a minor aged seventeen years was held liable for defamation. He was "old enough to know the better".

Where the act of a minor is both a tort and a breach of contract a question arises, is he liable for tort, notwithstanding that the contract is not binding on him, or does his action from exemption for breach of contract protect him against an action for the tort also. The following statement of law by Sir Frederick Pollock has secured judicial approval.

(i) "A minor cannot be sued for a wrong when the cause of action is in substance ex-contract, or is so directly connected with the contract that the action would be an indirect way of enforcing the." contract" This was settled in *Johnson* Vs. *Pye* where a minor over twentyyears induced the plantiff to lend him £ 300 by lies. He was not held liable for an action for deceit. It was held that if minors were liable on their contract by means of action in tort "all the infants in England will be ruined".

(ii) But if his wrong thought concerned with the subject matter of a contract, is independent of the contract in the sense that such wrongful act is not contemplated in the contract, then he is liable. This rule is established in *Burnard* Vs. *Haggis*, (1863) 14 C. B. In this case Burnard, a minor, was an under graduate of Trinity College, Cambridge. He hired from Haggis a mare which was let to him on the express condition that it was not to be used "for jumping or larking". Burnard, lent the horse to a friend and instigated him to put the mare at a fence in the field. The mare failed to jump and was impaled by a stake and died in consequence.

It was held that hiring the mare was a necessity, that Burnard was liable and damages were awarded.

Where an infant bailee refuses to deliver the property bailed, he can be sued for conversion or in detenue. In *Ballet* Vs. *Mingay*, (1943) K. B. 281, where a minor hired a microphone and was unable to return it as he had given it to third person contrary to the terms of the bailment the minor was held liable.

Capacity to sue—As far the question of suing a child can sue as an adult can. But the minor should sue by his next friend.

Q. "A parent or a guardian is not, in general liable for the tort of his child, discuss and point out the exception, if any, to the rule."

Ans. Liability of Parent or a Guardian for tort of child—As a general rule, a father or guardian in not liable for the tort of his children, even when they are under age and living in his house. There are two exception to this rule :

(i) While father has employed his son as a servant in his own concern so as to bring him within the rule of vicarious liability. In such a case father would be liable for the action of his son. In *Moon* Vs. *Towers*, (1860) 8 C. B. (H. S.) 611, the defendant employed his son as a treasurer at his theatre. The son wrongfully gave the plaintiff into the custody of the defendant's another servant, on a criminal charge. It was held that the defendant was not liable to an action for false imprisonment for he had neither authorised nor ratified his son's act and, therefor, it was outside the scope of employment.

(ii) Secondly, the parent will be liable of the child's tort where due to the parent's negligent control of the child in respect of the act that caused injury. The parent will also be liable if he expressly authorised the commission of the tort, or possibly if he ratified the child's act.

In *Babee* Vs. *Sales*, (1916) 32 T. L. R., a father supplied his son, 15 years of age, with an air gun and allowed him to remain in possession of it after he had ameshed a neighbour's window with it, he was held liable for the boy's tort in injuring the eyes of another boy with the gun.

In *Donaldson* Vs. *Me Niven*, (1952) 2 All. E. R. 691, a boy aged 13 had promised his father never to use his air-rifle outside the house. Subsequently he broke the promise. The court of appeal held that father shall not be liable.

Father shall not be liable to the plaintiff who is bitten by a dog which belongs to his daughter who is old enough (seventeen years) to be able to exercise control over it.

Problems

Q. (a) 'A', a minor hires a horse and injures it by negligent riding

(b) 'A', a minor aged five years struck an arrow shot from a bow in the eye of plaintiff, though 'A' did not aim at plaintiff.

Is 'A' liable for damages ?

Ans. (a) In this case the minor cannot be sued. The rule is that a minor "cannot be sued for a wrong when the cause of action is so directly connected with the contract that the action wonld be an indirect way of enforcing the eontract". This rule is founded upon the principle that a minor is not liable on this contract. In this case *A* is guilty of the breach of a contractual duty and, therefore, no action in tort can lie. In *Jennings* Vs. *Rundall*, 8 T. R. 335, Lord Kenyon, L. J. said. "The law of England has very wisely protected infants against their liability in case of contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be end to that protection which the law affords to infants.

Lord Mansfield indeed frequently said that this protection was to be used as a shield, and not as a sword ; therefore, if an infant commits an assault, or utters slander, God forbid that he should not be answerable for it in court of Justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him such person cannot resort to a court of law to enforce such contract. And the words "wrongfully injuriously and maliciously" introduced into the plaintiff's declaration cannot vary this case.

(b) In this case *A* shall not be held liable. He was too young to know the better. He could not have anticipated the result of arrow shot.

In *Wulmsely* Vs. *Humenick*, (1954) 2 D. R. L. 232. The defendant had not aimed at the plaintiff but the arrow shot struck the eye of the plaintiff. The defendant was not held liable. It was observed that even if the circumstances would have justified a finding of negligence against an adult, the Supreme Court of British Columbia held that he was not liable.

Q. (*i*) 'A', wife of 'B' was injured due to the negligent driving of her husband 'B' while he was driving car as an agent of his mother 'C'.

(*ii*) 'C' employed 'A', a lady and her husband 'B' to manage a public house. Set in the flood behind the bar was a trap door covered with a lift shaft. 'A', on going behind the bar, fell through the trap door which her husband had left open and was injured.

Is C liable to A ?

Ans. (i) *A*, wife can recover from *C* mother of *B* because he was acting as an agent of C. He took his wife *A* on receiving instructions from his mother. The rule is this that wife may also recover from the employeror the principal of her husband.

In *Smith* Vs. *Moss*, (1940), I. K. B. 424, a wife was iujured due to the negligence of her husband when he was driving the car as agent for his mother. It was held that his wife could recover against her mother-in-law for personal injuries. "The active operator in the tort, the husband had two capacities, that of husband, and that of agent, and at the time of accident he was acting in the latter capacity."

(ii) In this case *C* is liable to *A*. She sustained injury because of the negligence of her husband. Since husband was in the emoloyment of *C* and, as such, *A* can recover damages from *C*.

This has been established in *Broom* Vs. *Morgan* (1963) I. Q. B. 597, In this case the defendant employed the plaintiff and her husband to manage a public house. The plaintiff on going behind the bar, fell through the trapdoor which her husband had left open and was injured. It was held that master was liable, and the plea that because wife cannot maintain a suit in law of tort against her husband, it would also immune the master in whose course of employment he was working, was rejected. It was found that wife cannot sue her husband for personal injuries do not extend to protect the master as husband's immunity is personal.

Q. Write short notes on ;—

(1) A Convict **(3) Infant**
(2) An Alien enemy **(4) Insolvent.**

Ans. A Convict—In India until 1921 certain offences entailed forfeiture of the property of the offender. But forfeiture of the property of a convict is now not permitted except in the following cases :—

1. Under section 126 of the Indian Penal Code which provides: Whoever commits depredation (i. e. to plunder) or makes preparation to commit depradation on the territories of any power in alliance or at peace with the Government of India, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depradation, or acqiured by such depredation.

2. Under section 127 of the I. P. C. which provides "whoever receives any property knowing the same to have been taken in the commission of any of the offence mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

3. Under section 169 of the I. P. C—Whoever being a public servant and being legally bound as such public servant not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly or in shares with others, shall be punished with simple imprisonment for aterm which may extend to two years, or with fine or with both and the property if purchased shall be confiscated.

In India a convict may 'himself sue for torts both to his person and property.

2. **An alien enemy**—This term means a person of enemy nationality or person residing in enemy territory whatever his nationality. He cannot sue in his own right. In India alien enemies residing in India with the permission of central Government and alien friends may sue in any court otherwise competent to try the suit, as of they were citizens of India. But if the alien enemies are residing in India without the permission of Government of India or residing in a foreign country shall not sue in any such Court.

3. An infant—It connot maintain an action for injuries sustained by him while he or she was in mothers womb. A woman who bore a child in her womb was injured in a railway accident and the child when born was found to be deformed. The infant claimed Pounds 1030/–as damages, from the Railway company. It was held that the infant could not maintain an action. But in a similar case the Supreme Court of Canada granted a remedy to the infant.

4. An insolvent—An insolvent may be sued for a tort committed by him either before or during insolvency, and if a decree is obtained against him the amount awarded is a debt provable in insolvency. Action for wrong against person is always mantainable against an insolvent.

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CHAPTER VII

VICARIOUS LIABILITY

Q. In what circumstances is a master liable for torts committed by his servant ?

Ans. Vicarious liability—The liability of a master for the torts committed by his servant is an example of vicarious liability. Vicarious Liability means where one is liable for the tort of another. Vicarious Liability indicates the liability which *A* may incur to *C* for damage caused to *C* by the negligence or other tort of *B*. It is not necessary that *A* shall have participated in the commission of wrongful act or in omission of lawful act nor that duty owed in law by *A* to *C* shall have been broken. The most common example of this in modern law is the liability of master for the tort of his servant done in the course of his employment.

The following are the clrcumstances when a master is liable for his servant's tortious act :—

(i) Where a master expressly authorises an act to be done by the servant or ratifies that act subsequently.

(ii) A master is also liable for torts committed by his servant in the course of his employment, although committed without his authority.

(iii) A master is liable for tortious act done by his servant in the course of his employment even though they are wilful and forbidden by the master. In *Limpus* Vs. *London General Omnibus Co.*, the driver of the defendant's omnibus caused an accident by driving across in front of plaintiff's omnibus in order to prevent it from passing him. He admitted doing so with purpose and in retaliation for plaintiff's driver having prevented him from taking up three passengers by driving across in front of him. The Company's regulation prohibited drivers from racing or obstructing other omnibus. It was held that the defendants were liable.

Willes J. said : "Now, of course, one may say that it is not part of the duty of a servant to obstruct another omnibus, and that in this case the servant had distinct order not to obstruct the other omnibus......in my opinion these instructions were perfectly immaterial. If they were disregarded the law casts upon the master the liability for the tort of his servant in the course of his employment, and the law is not so futile as to allow the master, by giving secrect instructions to a servant, to set aside his liability......as well might it be said that if a master employing a servant told him that he should never break the law, he might thus absolve himself from all liability from any act of the servant, though in the course of his employment.

(iv) The master will also be liable if the servant's tort is committed with the intention of solely benefiting himself provided that the servant acts within the scope of his employment.

(v) Master shall also be liable where he lends his servant to some other person and there he commits a tort. In such a case it has to be seen under whose actual control the servant is and who directs him in the performance of a particular work. In such a case whether master or hirer of servant is liable, many factors have to be taken into account. Such as 'who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed'. The most satisfactory test, if it can be applied, is as to who at the particular time has authority to tell servant not only what he is to do, but also the way in which he is to do it.

Q. Elucidate and illustrate the maxim 'respondent superior'.

Ans. Maxim, "Respondent Superior."—The maxim respondent superior means 'let the principal be held responsible.' It is reasonable that master should pay damages because he can pay. The maxim is based on the fact that the master being superior can pay without any financial stringency and, as such, he should be held liable for the tort committed by servant during the course of employment.

Pollock explains the reason for master's liability in the following words :—

> "I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs and I am bound to see that my affairs are conducted with due regard to the safety of others".

This makes is clear that the master being superior has duty to see that servant employed by him injures none.

Lord Brongham in *Duncan* Vs. *Findlater* (1839) V. C. L. suggests the reason in the following words :—

> "I am liable for what is done for me and under my orders by the man I employ, for I may turn him off……when I please, and the reason I am liable is this that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

Lord Cranworth rightly observed "he is considered, and reasonably considered, as bound to guarantee third person against all hurt arising from the carelessness of himself or of those acting under his orders."

The above observation and views go to show that master is held liable because of his superiority. It is he who employs servant and the fear of liability always makes him think that he should keep a careful and obedient servant. The responsibility of the master is also based on the ground that master enjoys the fruit of labour of his servant and master gets benefit of the servant's work. The law also encumbers him with responsibility. Morever, the master, if he has already sustained loss once, then the fear of bearing the responsibility again will make him more cautious in selecting the servants.

In many cases master gets huge income through the labour of servants, employed by him. They get meagre share out of the profit. If servant himself is held liable it will tell upon his tight purse and no master would show slightest care in selection of servants. It would also be against justice if master is not held liable.

Problems

Q. 'A' emyloyed 'B' as a driver of mobile crane, and lent the crane together with 'B' as driver to 'C'. The contract between 'A' and 'C' provided that 'B' should be the servant of 'C' but 'B' was paid by A' and 'A' alone had power to dismiss him. In the course of loading a ship 'X' was injured by the negligence of 'B'. At the time of accident 'C' had the immediate direction and control of the operation to be executed by 'B' and his crane.

Decide whether 'A' or 'C' is vicariously liable to 'X'

Ans. In such a case it has to be seen who is the paymaster and who can dismiss and what machinery is employed. Here *A* is the paymaster and has the power to dismiss *B*. Crane was a machine a the use of which could not be directed by *C* to whom *B* was lent. Obviously *B* was under the control of *A*. *B*'s services were temporarily given to *C*. It is *A* who is vicariously liable to *X* for damage done to him by negligent act of *B*.

In *Mersey. Docks Harbour Board* Vs. *Coggis* and *Griffith*, the defendant lent their servant along with a crane and third person was injured. The defendant was paymaster and retained the power of dismissal. The House of Lords held that the defendant as the general and permanent employer of the servant was liable to *X*.

Q. (*i*) 'A' while retaining his right control of his car, allows 'B' to use it for the puropse in which 'A' has some interest and 'B' negligently injures 'C' with it.

(*ii*) 'B', a young man borrowed car belonging to his father 'A'. 'B' gave lift to a girl 'C' who is injured due to the negligence of 'B'. Can 'C' recover damage from 'A' ?

Ans. (i) In *Ormrod* Vs. *Crossviele Motor Service Ltd.* (1953) I. W. L. R. 1120, *A*, the owner of car, asked *B* to drive the car from Birkenhead Monte Carlo where they were to start a holiday together with the car. It was held that *A* was liable for *B*'s negligent driving.

In the above case *A* will be liable and *C* can recover damage from *A*.

(ii) Since *A* has no interest in the car at the time and he gave it to his son, for driving, and as such *A* is not liable for the negligence of *B*.

In *Hewitt* Vs. *Bonvin* a young man borrowed his father's car in order to take two girls friends to their homes and girls received injury due to the negligent driving of son. It was held that as the father had no interest in the journey he was not liable for his son's negligent driving.

Q. 'A' employed 'B' as driver of a petrol lorry. While 'B' was transferring petrol from the lorry to an underground tank in 'C's garage, 'B' struck a match to light his cigarette and threw it on the floor. This caused fire as a result of which 'C's' property is damaged. Is 'A' liable to 'C' ?

Ans. A common kind of wrong which the servant commits is one due to unlawful carlesness. And for a wrong committed during the course of employment master is liable. In this case *B* acted in a careless manner which resulted into fire and damaged the property of *C*. *A*. shall be liable to *C*.

In *Centurary Insurance Company Ltd.* Vs. *Northern Ireland Road Trans port Boards* (1942) A. C. 509, the driver of petrol lorry employed by the defendant struck match to light his cigarette and threw it on the floor which caused fire and explosion. The plaintiff's property was damaged.

The defendant were held liable, for the careless act of their driver which was done in the course of his employment.

Lord Wright pointed out that the act of driver in lighting his cigarette was done for his own comfort and convenience; it was in itself both innocent and harmless. But the act could not be treated in abstraction from the circumstances as a separate act ; the negligence was to be found by considering the time when and the circumstances in which the mach was struck and thrown down and this made negligent method of conducting his work.

Q. (i) The conductor of the defendant Road-ways, in removing from a bus a passenger whom he deemed to be drunk forcibly dragged him out and threw him upon the gaound, whereby he was seriously injured. The passenger sues the defendant Roadways for damages.

(ii) A carter, who suspected on mistaken but reasonable ground that a boy was pilfering sugar from the wagon of the Carter's employer. The Carter struck the boy on the back of the wagon went over his foot. Decide giving reasons.

Ans. (i) In this case the defendant Roadways shall be held liable. It is an established rule that master shall be liable for the wrongful act of his servant. The conductor drove out the passenger as a result of which the passenger received injuries and the act was done during the course of employment.

In *Seymour* Vs. *Greenwood*, the sarvant of defendants omnibus removed a passenger whom he thought drunk While he was being forcibly drawn he sustained serious injury. It was held that defendant was liable for the violent conduct of the servant in the performance of the act which was within the course of employment.

(ii) The Carter's employer is liable for the injury done to the child. A servant is supposed to protect the property of his master. The servant had implied authority to make reasonable efforts to protect and preserve master's property in an emergency which endangers it. For wrongful, because mis-taken, acts done within the scope of authority the master is liable. The master is liable because the blow given was excessive and it was not out of the scope of employment. The servant, no doubt, gave blow to boy in order to protect sugar of his master. But the act was wrongful as he acted on mistaken ground.

In *Poland* Vs. *Parse & Sons* (1927) I. K. B. 236, a boy was injured on being given a below by the carter who suspected on mistaken but reasonable grounds that the boy was pilfering sugar from Wagon of the employer. The employer was held liable because the blow given by the Carter, although somewhat excessive, was not sufficiently gross to make it outside the scope of employment.

Q. 'A', conductor of an Omnibus, without authority drove it in the absence of the driver. The conductor negligently injured 'A'. Can 'A' recover damages from the defendant ?

(ii) A lorry driver in the employment of the defendant permitted a stranger to drive his lorry. An accident resulted from the stranger's driving. Can employer be held liable ?

Ans—(i) In this case driving was not the class of act which conductor was authorised to do. The duty of the conductor is to accommodate passengers and to issue the tickets. The driving is the duty of the driver who is actually authorised by the employer to perform the job. Since the conductor's action in driving the bus was without authority, as such, the defendant employer is not liable and *A* cannot recover damages from him.

In *Beard* Vs. *London General Omnibus* (1900) 2 K. B. 530 at the end of the journey the driver of an omnibus went to get his dinner. During his temporary absence, the conductor drove the bus for the purpose of turning it round ready for the next journey and negligently injured the plaintiff. No evidence was given that the conductor had authority to drive in the absence of the driver. The defendant company were held not liable.

(ii) The stranger is not the servent of the employer. But driver is negligent in permitting a stranger to drive lorry. This negligence on the part of driver makes his employer liable for the damage done by the stranger. The driver allowed the stranger to drive in the course of his employment and was negligent in doing so.

In *I lkiw* Vs. *Samuels* (1963) I. W. L. R. 991 accident resulted by the negligent driving of stranger who was permitted by driver of lorry. The defendants were held liable, not for the stranger's negligence, for he was not their servent, but on the ground that the driver himself had been guilty of negligence in the course of his employment in permitting the stranger to drive.

Q. 'A' was owner of a Motor Car. He leaves it in charge of his chauffeur with the instructions to take him from his friend's house. In 'A's absence the chauffeur takes his family for a drive in the Car and during the drive negligently collides with and damages 'B' s' Car. 'B' sues 'A' to recover damages. Decide.

Ans. A master is not liable for the servent's wrong committed while making an unauthorised use of master's property for the servant's own purpose. When a servant commits a tort while acting "on a frolic of his own" master cannot be held responsible. The act done by the servent for his own enjoyment does not come in the course of employment. Master can be held responsibte only when he has interest in the act or the act is done according to his direction. In this case driver took the Car for his own enjoyment about which the master knew nothing. *B* can not recover damages from *A*.

In *Mitchell* Vs. *Crassweller* (1853) 13 C. B. 237, the defendant's servant was engaged to drive a Car. After returning to his employer's permises after his days work it was his duty take the horse and the cart to stable. But he drove the Car on a new journey exclusively for his own purpose. While returning he injured plaintiff by his negligent driving. It was held that the master was not liable.

Q. Discuss the circumstances in which a master is liable to third person for a tort committed by his servant. (L. U. 1978)

Ans. A master is liable to third persons for a tort committed by his servant provided the tort is committed in course of employment in the following circumstances :—

(i) A master is liable for the wrongful act of his servant committed in the course of his employment where the wrong is a natural consequence of something being done by a servant with ordinary case in execution of the master's specific orders. The master will be liable for the natural consequence of his orders even though he wished to avoid them, or,

(ii) Where the the wrong may be due to to the servant's want of care in the the carrying on the work or business in which the servent is employed. But if a servant acts in such disobedience to the instruction of his master as to be altogether outside the course of his duty or in such a way as to be on a frolic of his own. Than the master is not liable, or.

(iii) Where the servants wrong consists in excess or mistaken excecution of a lawful authority. In such cases it is necessary to show :—

(a) that the servant in fact intented to do something on behalf of his master which the servant was authorised to do, and

(b) that the act, if done in a proper manner or under the circumstances erroneously supposed by the servant to exist would have been lawful.

In cases where a servant does a wrongful act and thus commits a tort which is outside the scope of his authority or which his master would have had no power to do himself, and has not specifically authorised, the master will not be liable for such act of his servant.

(iv) A wrong wilfully committed, such as assault provided the act is done on behalf of the master and with the intention of serving his purpose.

(v) A master is also liable for the act of his servant to the third person for injuries caused to the third person in the following cases :—

(i) At common law.

(ii) Under the Employer's Liability Act 1880.

(iii) Under the Workmens Compensation Acts 1925 to 1934 in England and the workmen's compensation Act 1923.

In the end it may be emphatically and specifically pointed out that the liability of a master for torts committed by his servant involves two main points. The master can be held liable for the wrongful act of his servant when it can be proved that :—

(1) the relationship of master and servant existed between the defendant and the person committing the torts, and

(2) that the torts is committed by the servant in course of his employment.

Whether an act has been committed in course of employment or not a question of fact and can be decided after thorough examination of the material circumstances of each case. But the following two guidelines can be helpful in this respect :—

A servant is deemed to have acted in the course of his employment when (i) he does a wronoful act authgrised by the master *e.g.* is a master engages a servant to assault a man, the master must be held answerable for the tort committed by the servant. (ii) when he does an act in a wrongful and unauthorised manner—a manner not authorised by his master.

WILFUL WRONG OF SERVANT

Q. The instructions were printed on the defendant's Omnibus not to race or obstruct other Omnibuses. In disregard of these instructions the driver of Omnibus obstructed the plaintiff's Omnibus and caused collision which damaged it. Decide.

(ii) 'A', had expressly forbidden the driver of one ot their vans to give a lift to any unauthorized person and affixed a notice to this effect on the dashboard of the van. The driver gave life to a person who knew the breach of instructions and was killed owing to the driver's negligence.

Is 'A' liable to the plaintiff ?

Ans. (i) The collision of omnibus was due to the wilful wrong of the servant. There is well settled rule as regards wilful wrong of servant that the act done may still be in the course of employment even if it was expressly forbidden by the master. The prohibition by the master of an act or class of acts will only protect him from a liability which he would otherwise incur if it actually restricts what its servants is employed to do. The mere prohibition of mode of performing the employment is of no avail.

In this case defendant only prohibited the mode of employment by asking not to race or obstruct other omnibuses. The defendants are liable.

In *Limpus* Vs *London General Omnibus Co.*, the defendant's omnibus cellided with that of the plaintiff due to the drivers negligence. The driver did not pay heed to the instruction of his employers. The defendants were held liable because what the driver did was merely a wrongful, improper and unauthorised mode of doing an act which he was authorised to do, namely to promote the defendant's passengers carrying business in competition with their rivals.

(ii) The master is liable for the wrong of his servant only when it is done in the course of employment. A driver's duty is to drive van and not to lift passengers. The defendant had already forbidden for giving life to any person. He also put a signboard to this effect. The driver had no right to allow any person to board the bus. *A* is not liable.

In *Twine* Vs. *Beans Express Ltd.* (1946) 62 T.L.R. 155, the employers had expressly forbidden the driver of one of their vans to give lift to any unauthorised person. The driver gave a lift to a person who knew of the breach of instructions and was killed owing to the driver's negligence.

The Court of Appeal held that he was not acting within the course of his employment and his employers consequently were not liable. "He was doing some thing that he had no right whatsoever to do, and qua the deceased man he was as much a frolic of his own as if he had been driving somewhere on some on amusement of his own quite unauthorised by his employers. "Giving a lift to unauthorised person" was not merely a wrongful mode of performing the act of the class this driver was employed to perform but was the performance of an act of a class which he was not employed to perform at all.

Q. 'A' had sent her fur coat to 'X' to be cleaned and 'X' with her permission sent it to the 'Y' who was specialist cleaner. 'Y' handed the coat to his servant 'M' for him to clean it. 'M' stole the coat. Can 'Y' be liable to 'A' ?

Ans. *Y* is liable to *A* who can recover damages from him.

It was one time the view that if a servant stole goods his master could not be vicariously liable to their owner on that the act stealing necessarily took the servant outside the course of his employment. This view fails to recognise, however; that theft by a servant to whom the good stolen have been entrusted is the dishonest performance by the servant of what he was employed to do honestly, namely, to take case of the goods, and this is sufficient for liability.

In *Morris* Vs. *G. W. Martin & Sons Ltd.*, where older cases were ruled, the facts were the same and it was held by the Court of Appeal that on these facts the defendants were liable.

It is submitted that *Morris* Vs. *G. W. Martin & Sons Ltd.* could have been decided on the short ground that the servant's tort—conversion of the coat—was wrongful mode of performing the task entrusted to him by the defendants, namely cleaning and taking care of the coat and was thus committed in the course of employment.

The Court of Appeal, however, placed much reliance on the duty owed to the plaintiff by the defendant themselves as bailed of the coat, in effect, held that the theft of the coat, by the servant to whom they had delegated their own duty of reasonable care in respect of it, constituted a breach of that duty.

Q. Is a master liable for the damage done by the servant to the goods bailed ?

Ans. Master Liability for damage done by servant—As a master is liable for the theft of goods given in the supervision of his master in the same way master is liable for the damage caused by the servant to the goods which are the subject of bailment to his master. If the goods have been entrusted by the master to the care of his servant and the servant negligently damages them, his master will be vicariously liable to their owner, for the servant has done carelessly what he has employed to do carefully, namely to look after the goods. For holding the master liable vicariously it makes no difference that the servant at the time of his negligence was using the goods improperly for the purposes entirely of his own. For example if he uses a car, bailed to his master and entrusted to his care, for taking his friend to a ride and damages the car in accident.

The servant when using the car for his friend's ride is as much guilty of negligence in looking after the car as he would have been if the accident had occurred while he was using the car for an authorised purpose.

Q. Can an employer be held responsible for a tort committed by an independent contractor. If not, what are the circumstances in which employer is liable for the wrong done by independent contractor ?

Ans. Liability of employer for tort of independent contractor—In principle an employer is not responsible for the torts of his independent contractor—An independent contractor is one who under takes to produce given result. In the actual execution of the work he is not under the order or control of the person for whom he does it. He can use his own discretion in things not specified beforehand. He is not at the command of the person who had engaged him.

"But coachman whom I engage for a particular journey is not my servant ; he is not under my orders ; he has made a contract with me not that he will obey my direction but that he will drive me to a certain place, if an accident, happens by his negligence he is responsible and not I."

An independent contract is different from servant whose act of ommission makes the master liable. But an independent contractor while doing the work he is entrusted with exercises his own discretion. Obviously an employer cannot be held liable for the wrong done by a person who is guided by his own mind.

There are, however, certain circumstances in which employer is liable for the wrong of independent contractor He is liable :—

(a) For torts authorised or ratified by him or where the contractor is employed to do an illegal act, for here they are both liable as joint tortfeasors. In *Ellis* Vs. *Sheffield Gas Consumers Co.* (1853) 2 E. L. & B. I. 757, the defendants without authority, employed contractor to dig trench in street for gas pipes. Contractor's servant carelessly left heap of stone on footpath ; plaintiff fell over them and was injured. The contract was to do an illegal act, a public nuisance, and defendents were liable.

(b) For his own negligence ;

(c) Cases of strict liability are sometimes treated as exception, but it is doubtful if they are so in theory ;

(d) He is liable if he personally interfers with the contractor or his servant and in fact directs the manner in which work is to be done.

It is submitted that the true question in every case in which an employer is sued for damage caused by his independent contractor is whether the employer himself was in breach of some duty which he himself owed to the plaintiff. Such a breach of duty may exist if the employer has not taken care to select a competent contractor or has employed an inadequate number of men.

The breach of duty also exists, if the contractor alone has been at fault, provided that the duty cast upon the employer is of the kind commonly described "as nondelegatable".

Q. Explain the doctrine of Common employment as it prevailed in England before the Law Reforms (Personal Injuries).

Ans. Doctrine of Common Employment—The doctrine meant that a master was not liable to a servant who was injured by a wrongful act of a fellow servant who was at the time of common employment with him. The rule was supported on the ground that the employee by his contract of employment agrees with his employer to assume the risk of his fellow servant's negligence.

Conditions—Two conditions have to be fulfilled in order that the defence of common employment may be available :—

1. The aggrieved servant and the servant causing injury must be fellow servants i. e., they must be in the service of common employer. Common employment does not necessarily imply that both servants should be employed precisely in the same or even similar acts. All persons engaged under the same employer for purpose of same business, however, different in detail these purpose may be, are

fellow servants in common employment. Unless there is a common master, there cannot be said to be a common employment. The term "fellow servant" includes persons who gratitously or temporarily assist a servant in his work.

2. They must at the time of accident have been engaged in common employment in the sense that the safety of one servant must in the ordinary and natural course of things depend on the care and skill of the other. Fmployments are said to be common within the meaning of this rule when they are so connected with each other that the risk of an accident due to the conduct of one of them is a natural accident of the other, so that such risk must be deemed to have been in the contemplation of the servant when he undertook that employment.

In *Rodcliff* Vs. *Ribble*, (1939) A. C. 215. *A* and *B* were motor drivers employed by defendants to take parties by Motor Coaches for Liverpool to *N. B*, had been told to return defendant's garage at *G*, the particular route of his return being left to his own discretion. On the return journey *B*'s for unknown reason stopped in a street in Liverpool. *A* happened to be returning by the same route and pulling out to *B*'s Vehicle he negligently knowcked over and injured *B*, who was standing by his own vehicle. *B* files a suit for damages against the defendants.

Held, that *A* and *B* were not in common employment when the accident happened at Liverpool. The risk was the general risk of the highway, not the specific risk of the fellow servant's negligence. Therefore, the defendants were liable, they could not rely on the plea of common employment as excluding their liability.

Exceptions and Limitations to the Doctrine of Common Employment—There are certain cases in which the defence of common employment is not available even for the negligence of a fellow servant. They are the following :—

(i) Breach of absolute or statutory duty - In cases where a statute casts a duty on a master, he is bound to perform it, and becomes liable for the breach of such statutory duty.

(ii) Master's negligence—If a master is proved to have been guilty of negligence either in selecting his servant whom he knew to be incompetent or in retaining servant even after having knowledge of their incompetence, even though the initial appointment might have been made in ignorance of that fact, he is liable to the servant to whom the injury has been caused by a fellow servant. The reason is that the injury caused by fellow servant in such circumstances can be attributed to the negligence of the master himself.

(iii) Breach of duty to use reasonable care—Master is bound to take reasonable precaution to secure the safety of his servants and workmen and disclose to them any hidden danger that they are not aware of.

(iv) The master is bound to provide proper and competent fellow servant. Master is not bound to warrant the competence of his servant.

In a number of cases the doctrine was crticised as illogical and founded with little regard to reality or to modern ideas of economics on industrial conditions. The irrelevance of the doctrine in cases of service under compulsion was illustrated in *Tozelands* Vs. *West Ham Union Guardians*, 75 L. K. B., 353, where a pauper inmate of a work house, who was ordered to assist in some electric light installation work, was injured while so helping by the collapse of a scaffold, which had been erected under the supervision of an engineer in the defendant's employ. "It seems to me" said Lord Alverstone, C. S., "an unjustifiable extention of the doctrine of the common employment to say that for a man to go in a starving condition into the work' house is equivalent to a contract on his part to do any work he may be ordered to do as though he were a servant who could refuse to do it."

The doctrine finally comes to end when the Law Reforms (Personal Injuries) Act 1948 finally abolished the doctrine. Section I of the Act runs, "It shall not be a defence ro an employer, who is sued in respect of personal injuries caused by the negligence of a person employed by him, that the person was at the time injuries were caused in common employment with person injured."

In *India in Secretary of State* Vs. *Rukmin*, 1933 Nagpur Stone, C. J. expressed his disapproval of the doctrine and refused to fellow it.

Q. State with reference to decided cases, the liability of the Government for tortious acts of its servants done in the Course of employment.

A who was carrying gold to the market was taken into police custody overnight on the suspicion that the gold might be stolen. The head constable removed the gold from the police malkhana and with it fled away to Pakistan. It was proved that. "A" was innocent. A sued the Government alleging vicarious liability for police negligence. Decide. (L. U. 1977).

Ans—Liability of the Government for tortious, acts of its servants done in course of employment—The Government and its officers have by the authority of law various powers. No action can be brought against it and its officers for any injury done by them in the exercise of their statutory powers. But where the government officers exceed their powers and thus act illegally they place themselves in the same position as any one else who acts illegally and they are not protected by the mere fact that they held official position.

In accordance with Article 300 of the constitution of India, the Government is liable to sue and be sued in the name of the state.

In the problem given in the question there are two different parts. In the first part *A* was taken into police custody on the suspicion that the gold might be stolen property. Here the police officer has acted in mistaken execution of lawful authority. For such acts of the police officers government can be sued if the mistake is not bonafide. Thus where *A* arrests *B* and thinks that he (the latter) is *C* for whom he has got a warrant of arrest then Government will not be liable of the mistake is bonafide. But if the mistake is not bonafide then government would be liable for the wrongful action of A.

Now we come to the second part where the gold is stolen from the malkhama. It is a well established principle of the law of tort that a master is liable for the fraudulent act of his servant. We may quote have *LLoyd* Vs. *Grace Smith* in this context. The facts of this case are, the plaintiff, a widow owning a small cottage and some money, due on a mortgage to the extent of £. 1000 approached the manager of the defendant, a firm of solicitors for advice as to how to improve her income. The manager advised her to sell the cottage and call in the mortgage moneys. She authorised the manager to sell the cottage and to collect money. The manager absconded with the money. The plaintiff sued to recover the money from the defandants. In this case it was held that the defendant (i. e. the employer of the manager) would be liable for all the fund committed to the servant, whether for the benefit of the employer or for his own benefit.

Q. Write short note on :—

1. **Respondent Superior** **(L. U. 1977)**
2. **Qui facit per alium facit per se.**

Ans. (1) Respondent superior—The rule that a master is legally liable for every wrongful act of his servant or agent as is committed in the course of service though no express command or privity of the master be proved is based on the maxim Respondent superior. The maxim originates from the presumption that all acts done by the servant in and about his masters business are done by his masters express or implied authority and are therefore in fact acts of his master.

The Justification for this principle is two fold :

(i) the difficulty in the way of proving actual authority, and

(ii) that the employers usually are white their servants are not financially capable of the burden of civil liability.

If this rule is not there a rich man who employs a poor servant to commit a wrongful act, will go scot free and the person wronged will not be compensated. This would result in injustice.

(2) Qui facit pre alium facit per se—This means he who does an act through another is deemed to have done it himself and therefore is liable for it. In such a case the person authorising is liable not only for the tort. actually authorised but also for its direct consequences. The authority may be previous or subsequent.

Q. A, the owner of a motor car gave instructions to his driver not to disregard any statutory rule but the driver violated and thus incurred a civil liability. Will the owner of the car be liable for the drivers wrongful action ? Discuss

Ans—Normally a master is liable for the tort committed by his servant provided the tort is committed by the servant in the course of employment. The only relevant consederations before the master is held liable for the act of his servant are whether the act is done by the servant in the scope or course of his employment.

A statutory rule providing that no person should be carried in a goods vehicle other than a bonafide employee of the owner or hirer of the vehicle deals with the conduct of the driver within the sphere of employment. The sphere of employment of driver is to drive the vehicle in execution of the masters business. That sphere is not in any manner limited by the prohibition contained is the statutory rule in question. It is a question of fact to be determined in each case whether the prohibition defines the sphere of employment or it merely deals with the conduct within the sphere of employment.

The act of a servant, employed to drive a vehicle in giving lift to a person in disregard to a statutory rule or prohibition while driving the vehicle in execution of the owners business is an act for which the owner is vicariously liable. [AIR (1979) M. P. 74]

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CHAPTER VIII

JOINT TORT-FEASORS

Q. Who are joint tort-feasors ? If the plaintiff realises damages from one of them only, can he claim contribution from the others ? If so when ? (L. U. 1978)

Ans. Joint Tort-Feasors—When several persons jointly commit a tort "each is responsible for the injury sustained by their common act." In other words, if the cause of action against all of them is same or the same evidence would support an action against each, they are joint tort-feasors. In order to be joint tort-feasors they must, in fact or in law, have committed the same wrongful act.

The definition of Joint tort-feasors has been given in the case of Koursk (1924) 131 L. T. 700 in the following words :

> "Persons are said to be joint tort-feasors when their respective shares in the commission of tort are alone in furtherence of a common design but merely similarity of design on the part of independent contractor, causing independent damage is not enough, there must be concerted action to a common end."

If a servant commits a tort in the course of his employment master is also liable and thus master and servant are joint tort-feasors or agent and principal. Where dogs of two persons jointly worry neighbour's sheep, the owners of the dogs are joint tort-feasors.

On the other hand, the parent or custodian of a child whose personal negligence enable the child to commit a tort, though he may be liable for resulting damage, is not a joint tort-feasor with the child. His liability is for his own independent tort.

It was formerly thought that all persons concerned in the publication of defamatory matter, such as the author, publisher and printer of a book, must be joint tort-feasors, but it is now known that this is not necessarily the case. A person cannot be held liable if the publication is fair comment on a public interest or if it is made on an occasion of qualified privilege. He will be liable only when he himself was malicious.

For the joint tort feasors there must be common design which will create joint liability. In Koursk Case, the Koursk and Clain Chisholm collide with each other by independent acts of negligence on the part of each vessel. Due to this collisions the Clain Chisholm ran into and sank Itaria The owners of the Itaria recovered damages against the Clain Chisholm and then sued the owners of Koursk. It was held that the causes are distinct and the two suips were not joint tort-feasors and that the judgment against the one will not bar the other. They had no community of design and they were independent wrongdoers.

Contribution—At common law, if an action was brought for a joint tort and one tort-feasor paid the whole damage recovered, the general rule was that he could not recover any portion of the sum so paid for others. This rule was laid down in *Marryweather* Vs. *Nixon* (1799) T. R. 186.

This law came to an end by the enactment of the Law Reform (Married Woman and Tort-Feasors) Act 1935. Section 6 (1) (c) of this act provides that where damage is suffered by any person as a result of a tort (whether a crime or not), any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor, who is, or would if sued have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so however, that no person is entitled to be indemnified by him in respect of the liability in respect of which contribution is sought.

The above rule makes it clear that if the plaintiff realises damages from one of the joint tort-feasors only, he can claim contribution from other joint tort-feasors. The joint tort-feasor can recover damages only when the other joint tort-feasors, if sued, would have been liable for the same tort. But he cannot do so if that other tort-feasor was entitled for for same reason to be indemnified by him. If, for example, *A* and *B* have agreed, before doing some act which in the event involves them both in tortious liability, that *A* shall indemnify *B* in respest of any liability, arising thereform, and *C* the injured party, recovers damages from *A*, *A* cannot recoup himself against *B* for the act is not obviously wrongful one, the agreement to indemnify is a lawful agreements and the section accordingly prevents *A* from getting contribution from *B*.

Q. 'No suit for contribution lies, as a general rule among joint tort-feasors inter se. Examine the statement with reference to both Indian and England law.

Ans. No Suit Amongs Joint Tort-Feasors inter se—In *Marryweather* Vs. *Nixon* it was laid down that a joint tort-feasor against whom damages were awarded could get neither an indemmnity for the whole of what he had paid nor contribution of any part of it.

The Law Reform (Married Women and Tort-Feasors). Act 1935 had reversed the common law rule by allowing tort-feasor to recover contribution from any otherr tort-feasor who is or could if **sued have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise.**

No contribution can be received from a co-tort-feasor who is entitled to be indemnified by the person seeking contribution.

A wrong-doer cannot recover contribution from an innocent person whom he was led into the commission of a tort for a principal must indemnify his agent for all liability incurred by him in consequence of the act authorised being (withouht the knowledge of the agent) an illegal one. This principal was also followed in *Adamson* Vs. *Jarivs* where the plaintiff who as auctioneer was entitled to be indemnified by the defendant, a client, who had instructed him to sell goods to which, as it subsequently appeared, he had no title.

The Act of 1935 imposes certain restriction on the right of contribution, where a plaintiff *P* has been injured by the concurrent negligence of two defendants *X* and *Y*, then if *X* is not liable to *P* because of some defence to him the entire loss must be borne by *Y*.

The right of contribution between tort-feasors is not it-self a right of action in tort, but it is a right *sui negevis* conferred by statute and it is available to *Y* only when the liability of the claimant tort-feasor has been ascertained.

Indian Law—In India there is no such act as the Reform (Married Women Tort-Feasor) Act 1935 as in England. Thus, in India the rule laid down in *Marryweather* Vs. *Nixon* is still in force. In other words, the suit for contribution between joint tort-feasors do not lie in this country.

The modern trend is, however, in favour of the provision of the Act. The Nagpur High Court in *Khusal Rao* Vs. *Bapu Rao* laid down that where a joint decree is passed against several persons in a suit in tort and one of them satisfies the decree, he can obtained contribution from his co-judgment debtors.

In *Venkata Rao* Vs. *Vekayya* (A. I. R. 1943 Mad. 38) where the plaintiff brought a suit against his brother for contributions. The two brothers had been publishing books as a firm. They entered into a partition on 15th April 1928 and one of the terms of that partition was to throw upon both of them any losses or difficulties which should arise from any of their business carried on prior to 2 nd March. It was the finding of the subordinate judge that it was published before partition and was that there has been an infringement of copy-right of the author who was dead and his widow started criminal proceedings against the publishers for the infringement of copy-right. The claim was compounded and plaintiff paid some money to the widow and now the plaintiff wants contribution.

It was observed that the court is unable to accede to the contention for the respondent that the rule in *Marry weather* Vs. *Nixon* should be applied in this country. In England the universal application of the rule had long been questioned and finally in 1953 a new Act was passed by which the rule is no longer good law and no longer enforceable in English courts. The Judge further said that it is only if I were bound by any authority in this country to apply the rule that I would think of doing so and it is conceded by the learned Advocate for the respondent that the only authority which he can produce in favour of the application of the rule to a case in this country is one by a single Judge of this country. I am not with respect prepared to accept that ruling or to apply the rule in any case. There is, therefore, no legal impediment to granting of a decree to the plaintiff.

In *Lakshman Ayyar* Vs. *Rangaswami Ayyar*, a deed of partition between *A* and *B*, members of an undivided family, provided that *A*, who took over all the debts due tn the family, should bear the loss if any incurred in the appeal, then pending in a suit brought by the family on a bond. The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs. The decree for costs was executed against *B* and satisfied by him ; he now sued the sons of *A* (deceased) to recover the amount paid by him.

It was held that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between Joint tortfeasors.

CHAPTER IX

FOREIGN TORT

Q. What are the circumstances in which a tort committed in a foreign country is actionable in India ?

Ans. Foreign tort—Law of tort as existing in England is applied in India. In order to understand the circumstances in which a tort committed in a foreign country is actionable in India is necessary to know about the law of tort as applied in England.

In England torts, other than, a suit for trespasser in respect of land, are actionable provided following conditions are fulfilled, namely, whether act done in a foreign country is or is not a tort in England depends upon the combined effect on the law of country where the act is done (*Lex Luci Delicti Coumissi*) and of the law of England (*Lex Fori*).

The general rule may be amplified under three following propositions :

1. If the defendant's conduct is not justifiable by foreign law, but is not tortious here, no action for tort lies against him in an English court.

In the case of the Halley, the Halley a British vessel, while under navigation of a Belgian Pilot in Belgian waters, collided owing to the pilot's negligence, with a Norwegian barque. The owner of the barque claimed damages in England against the Halley. According to Belgian law, the Halley was compelled to accept the services of the pilot and was not exempted from liability for his negligence. According to English law, as it then stood, there was no liability for the negligence of a compulsory pilot. Hence the injury was not justifiable according to Belgian law, but was not tortious according to English law. The court, therefore, held that Halley was not liable.

2. If the defendant's conduct is justifiable by foreign law, but it is tortious according to English law, no action for tort lies against him in an English court.

Cockburn, L. C. I. in *Philips* Vs. *Eyre.* said "it appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law is committed here, cannot be made ground of an action in an English court."

In the above case *X* assaults and imprisons *A* in Jamica. At the time of the assault *X*'s assault is wrongful both by the law of Jamica and by the law of England. The assault takes place for the purpose of suppressing a Rebellion. The Legislature of Jamiea passed an act of indemnity under which an assault was made lawful. The assault is, after passing of the Act, not a tort. The court did not entertain the action.

3. If the defendant's conduct is not justifiable by foreign law and is tortious according to English law an action in tort is maintaind in England.

In *M. C. Elroy* Vs. *Mc. Altister* the persure's husband who was resident in Glasgow, was killed in a road accident in England by the alleged negligence of the defender who was also resident in Glasgow." If the accident had happened in Scotland the persuer could have recovered substantial damages in respect of solatium and matrimonial loss. If the action had been brouhgt in England, she could have recovered substantial damages as a dependent under the Fatal Accident Act 1846 and as executive for the deceased for loss, of expectation of life under the law reform (Miscellaneous Provisions) Act, 1934. It was held, however, by a full court of seven Judges that she could recover Pound 40 in respect of funeral expenses, that being the only point at which Scots and English law coincided. The claim for solatium failed because English law does not recognise such a claim for wrongful death.

Problems

Q. (a) Under what circumstances can a tort committed in America against and Indian national be actionable in India ? (*L.U.*)

(b) Would it make any difference if the tort were committed against an India National in an aircraft registered in America while flying over Cairo ?

Ans. (a) When the defendant's conduct is not justifiable by the American law and is tortious according to Indian law an action in tort is maintainable in India. The tort committed against Indian National is not justified in America and the act is tortious in India in such a case Indian court can entertain the suit.

(b) It would make no difference if tort were committed against an Indian national in an aircraft registered in America while flying over Cairo, if the action is tortious at both the places.

"If the act is not justifiable according to the law of Cairo where the aircraft was flying and is tortious according to Indian law an action in tort will lie in England.

Q. 'A' and 'B' are residents of country 'X'. 'A' publishes a libel against 'B' in country 'Y' where it is only a criminal offence. 'B' brings an action for damages against 'A' in a court of country 'X', will the suit succeed. Give reasons for your answer and refer the case law with which you are familiar. (*L. U.* 1977)

Ans. *B* can claim damages from *A*. The suit is maintainable because of the fact that the act is justifiable in *Y* country and is actionable in *X* country. It is not a defence to the action that in *Y* country libel is a crime but not a civil injury. The general rule that when an act is not justifiable by foreign law and is tortious in the native country action is maintainable, will apply.

The question has also been decided in *Machado* Vs. *Fontes* (1897) 2 Q. B. 231. In this case the Court of Appeal held that the act need not be actionable in the place where it is done in order to be actionable in England. It is sufficient if it is not legally justifiable and is punishable.

The plaintiff recovered damages in England for a libel punished in Brazil, although libel is not in Brazil a cause of action for damage but exclusively a criminal offence.

CHAPTER X

REMEDIES

Q. What are extra-judicial remedies ? In what cases are they available ?

Ans. Extra-judicial Remedies :—These are :

1. Self help—Extra-judicial remedies are based on self-help. In such a case the person with whom wrong has been done, instead of seeking remedy in a court of law makes the reparation himself. In fact there is no question of remedy in such a case. In extra-judicial remedy a person is allowed to repeal by force. "Not for the redress of injuries but for their prevention, not in order to undo a wrong or to get a compensation for it, but to cut wrong short before it is done ; and the right goes to the extent necessary for this purpose." It extra-judicial remedy, the party by some lawful act restores to him, something which he ought to have or puts an end to a state of things whereby he is wronged or least puts pressure on the wrong-doer to do him right. The right of self-help, like the right to selfdefence is subject to some limitations. The force must not be (i) unnecessary or (ii) disproportionate to the evil to be remedied.

The remedies mentioned below are based on the right of self-help.

2. Expulsion of the tres-passer—If *A* enters the house of *B* without any legal justification, *B* can resort to self-help and pull him out. The owner of a house or land can use force in expelling a trespasser. It should be borne in mind that the force must be reasonable and proportionate. The tres-passer must be asked and given an opportunity to leave premises before he is driven out by force.

3. Re-entry on land—If a person has been dispossessed from his land or building by another, he may re-enter and take possession of his property if he can do so peacefully.

4. Recaption of goods and chattels—If a person takes away the goods of another, person upon his own land, he gives to the owner of them an implied licence to enter for the purpose of recaption.

5. Distress, damage feasant—This is an old form of extra judicial remedy. This means distraint of things doing damage. This right can be exercised by the occupier of a land with respect to cattle or orher things which trespass on his land and do damage. The occupier can detain the cattle as security for the compensation of the damage, done by the cattle. The owner of the cattle may pay for the damages and release his cattle.

6. Abatement of Nuisance—An occupier of land may after previous notice enter upon another's adjoining land for the purpose of removing nuisance upon it. Abatment must be (i) peaceful (ii) without danger to life and limb (iii) after notice to remove the same.

Thus the occupier of land may cut off the over-hanging branches of his neighbour's tree or sever roots which have spread from these trees into his own land. [*Lemmon* Vs. *Webb* (1895) A. C.]

Q. Uuder what circumstances is the remedy of injuction a ailable for a tortious act ?

Ans. Remedy of Injunction For a Tortious Act—An injunction is a judgment or the order of the court restraining the commission or continuance of some wrongful act, or the continuance of some wrogful omission. It is different from self-help where a person assists himself. In injunction the aggrieved party seeks the assistance from the court of law.

The person against whom self-help is applied may repulse it, bur non-compliance of the injunction order is a serious offence in the eyes of law. The remedy depends upon the discretion of the cours and it is wrong to think that it can be obtained as a mattter of right. The exercise of the court's discretion will depend upon the following considerations :—

(i) Whether the injury suspected is continuous or permanently repeated or very serious.

(ii) The loss to the plaintiff if the injunction is refused or to the defenders if the injunction is granted.

(iii) The interest of the third person.

(iv) The acquiescence of the plaintiff.

Injunction may be :—

(a) Interlocutory and perpetual injunction—Interlocutory injunction is that which is provisionally issued until the hearing of the case. It means that case has not been disposed of in favour of plaintiff or defendant. The issue of this type of injunction is an indication by the fact that substantial question is to be tried.

The perpetual injunction is an order which is issued after the hearing and determination of the question between the parties.

(b) Prohibitory and mandatory Injunction—Prohibitory injunction is an order restraining the defendant from committing or repeating an injurious act ; while a mandatory injunction is an order requiring the defendant to do some positive act for the purpose of putting an end to a wrongful state of things created by him. In other words we can say that mandatory injunction the defendant is ordered to undo the act which he has done.

(c) **Quia timet action**—If the worng is merely feared, but not yet committed, the proper remedy is *a quia timet action*. It prevents the commission of an injury in the future *e. g.*, establish a fever hospital which would be dangerous nuisance to the plaintiff's premises. In these case it is essential that there must be sufficient probability that danger is substantial and will be continued, repeated or committed at no distant future.

Q Distinguish between :

(1 Cantemptuous Damage and Nominal damage.

(2) Ordinary damage and exemplary damage.

Ans. (1) Contemptuous Damage—When this type of damage is awarded by the court, it forms very low opinion of the plaintiff's claim. Sometimes in the case of defamation where the injury to reputation is so small that the plaintff has no moral justification for maintaing the suit, the court awards contemptuous damages.

Nominal Damage—Nominal damages are small sums of money awarded not by way of compensation for any actual loss suffered but they recognise the fact that plaintiff's legal right has been infringed as in the case of *Ashby* Vs. *White*.

In *Constantine* Vs. *Imperial London Hotels* where a plaintiff, the famous West Indian Cricketer, was awarded nominal damages because the defendant refused to receive him into one of their hotels to which he wished to go, though they provided him with lodging in another of their hotels. In the case of nominal damages the court at its discretion may deprive the plaintiff of the cost of the suit or even he may be asked to pay the cost of both sides.

(2) **Ordinary damages**—This type of damages are generally awarded. They represent fair and anequate compensation for the injury of the plaintiff. Substantial damages are damages which are intended, subject to the rules of remoteness, to compensate the plaintiff for the damage which he has suffered as a result of the defendant's wrongful act. In *Most* Vs. *Christ Church R. D.* C. (1925) 2 K. B. 750 where a cottage was destroyed by a fire caused by spark from the defendant's stream roller which was held to be nuisance, the measure of the damages was the value of the cottage before its destruction and not the cost of replacement. Hence there are some cases as remarked by Wingfield, in which more than replacement value will be recoverable *e. g.*, if a historie mansion be burnt down, no one would suggest that the mere cost of replacing the old bricks by new ones would fairly represent the actual loss.

The *Payke* Vs. *Railway executive* (1951) 2 A11. E. R. 910, the plaintiff while serving in the Regal Navy was seriously injured in a railway accident for which the defendants admitted liability. He was invalidated from the service and was awarded a disability pension in assessing the amount of which the Minister for Pension had power to take into account the amount of compensation awarded to the plaintiff. Later the plaintiff sued the defendant for damages for negligence and was awarded 3,000 for the loss of future earning and to 2500 for pain and suffering. It was held that in assessing damages attributable to loss of earning the amount of the disability pension must be disregarded.

(b) Exemplary damages—These damages are awarded more than the loss actually suffered by the plaintiff. They are awarded for any insult or other outrage to his feeling that is involved in the injury complained of. These represent the Jury's indignation at an especially outrageous attack on plaintiff's security or at wanton misconduct on the defendant's part. They serve as deterrent for other offenders in like cases.

In *Morest* Vs. *Harvey* (*1814*) 5 *Tount 442* the plaintiff had a shooting party on his own estate which adjoined the highway. The defendant who was a banker, a Magistrate and a Member of Parliament and who had dined and drunk freely left his carriage on the highway and insisted with oath and threats in joining in the sport. The plaintiff who behaved throughout with laudable and dignified coolness, received Pound 500 damages for the trespass.

Q. Are there any differences between the measures of damages for breaches of contract and the measures of damages for tort. If so What ?

Ans. Distinction Between Measures of Damages for Breach of Contract and Tort—The test for damages by which the amount of damages is to be ascertained is in general the same both in contract and tort with following distinctions :

(1) The intention in the breach of contract is immaterial, where in the case of tort intention is taken into account by the court in the assessment of damages. Evidence of malicious matter is not admissible in an action of contract but in action of tort it is.

In *Sears* Vs. *Lyous* (1818) in an action for throwing poisioned barley upon the plaintiff premises to poision his poultry, the court took into account the malicious intention of the defendant in awarding damages.

(2) Only compensation is awarded as damages in the case of breach of contract. In the case of tort to the property damages are awarded in the form of compensation Injuries to the property are only visited with damages proportioned or the actual pecuniary loss sustained, where damages pecuniary or estimable in money is the gist of action. But where the absolure rights are infringed, a plaintiff is awarded nominal damages not because he has lost anything but because his rights are absolute. Where the injury is to the person or feeling and the facts disclose fraud, malice. violence, cruelty or insult it is difficult to fix a limit and damages

awarded in such a case are exemplary. They bear no proportion to the actual loss sustained by the Plaintiff. This is done not on the principle of compensation to the plaintiff to recognition of superiority of his right, but it is done by way of the expression or disapproval of the defendants conduct and of an intention to prevent its repetition. But exemplary damages cannot be recovered for a breach of contract except in an action for breach of promise of marriage.

In suit for damages, unlike contract, the defendant is responsible whether he was not aware of the relevant facts of his action that did in fact cause the damage.

CHAPTER XI

DEATH IN RELATION TO TORT

Q. Dissuss the maxim 'action personal is moritur cum persona' indicating clearly its persent position under English and Indian Law.

Ans. The maxim *action personalis moritur cum persona* means that a personal action dies with the parties to the cause. The maxim expressed the rule at common law that the personal representatives of a deceased person could not recover damages in tort for personal injuries done to the deceased during his life time, whether or not such injuries had caused death. The rule can be illustrated by the following example. If *X* was killed by a motorist *A*, *X*'s representatives could not sue the motorist because of the rule for which the maxim stands. On the other hand if *A* was injured but not killed, but the motorist died before the judgment was given against him, the action stayed and could not be proceeded.

The rule could not find favour in modern judicial pronouncement and legislative enactments. It is now looked upon as embodying hardship and based upon no good reason. The act of party in those days could not change the relation which effected two, nor when one dies the duty could also not be changed. If the creditor dies it will not devolve on another to enforce the duty as against the debtor, nor if the debtor dies, will the law hold the representatives responsible. If one doth a trespass to me and died, the action is dead also, because it would be improper to recover against one who was not a party to the wrong. But the modern law could not appreciate the doctrine of non-transferability of personal right of action and tried to do away with it. The reasons seem to be as follows :

The development of a satisfactory theory succession and representation in the estate of the deceased person contributed much to put an end to the doctorine that the personal right of action perishes with the death of either party. One conception which seems to have been a vital factor from the first in limiting the maxim of the question is the principle of inherent transferability of things and of rights incident to things.

The other cause is that ownerships is good as aginst the world. All individuals are bound not to disturb me in my property rights, and when my lands or chattels are seized by another, I have right to recover them regardless the wrongdoer dies.

Exception to the rule : These are :

(1) **At common Law**—There are two main exceptions :

(a) **Actions on contract**—It has been laid down that "death is no discharge of debt and would be great defect in law that no remedy should be given for it. This exception relates to contract. It was since long that for personal wrongs compensation for the benefit of estate was recoverable just as if the plaintiff had not died.

(b) **Enrichment of tort-feasor's Estate**—Where the property or the proceeds of value, belonging to the plaintiff have been appropriated by a person since deceased and have been added to his own estate or money's the plaintiff can sue the such property, its proceeds or value.

Thus in Sherington's case (1582) the executor were held chargeable for one hundred oaks and twenty oxen which the testator had wrongfully taken away from the claimant's land.

The exact extent of the executor's obligation under this heading was somewhat obscure until 1833, when the Court of appeal clarified it in *Phillips* Vs. *Homfray*. There the deceased had wrongfully taken a quantity of minerals from under the plaintiff's farm. The plaintiff claimed from his executor (a) the value which the minerals, had at the pits mouth ; (b) compensation for use by the deceased of the passages in the mine for the purpose of bringing the minerals to the pit's mouth ; (c) compensation for injuries to these passages. The Court of Appeal unanimously held that claim (a) was good on the principle stated at the head of sub-section. The Court of Appeal also agreed that claim (c) was bad, for it was claim for trespass and that had perished with the testator. And by a majority they held that claim (b) was also bad.

(ii) Exception by Statute—The statutory exceptions are now embodied principally in the Law Reforms (Miscellaneous Provisions) Act 1934. The chief reasons for the Act was the fact the defects of the existing law were forced upon the attention of the legislature by the growth of the motor traffic. But in 1934 this evil was worst because hundreds of people were killed by motor accident. A specially hard case was that of person severely injured or killed by the negligence of the motor driver who himself was killed in the motor accident. Nothing was recoverable by the survivor (or his representative if he were killed) against the estate of the dead tortfeasor, and it often happened that the man injured or killed by the deceased's negligence had not insured himself against injuries or death.

The Act of 1934 was, therefore, passed and it may be thus summarised :

(a) Survival of cause of action—All causes of action subsisting against or vested in any person on his death shall survive against or, as the case may be, for the benefit of his estate. But this does not apply to the cause of action for (a) defamation (b) Seduction, (c) inducing one spouse to leave or remain apart from the other and (d) damages for adultery.

This act was first applied in this case of *Slater* Vs. *Spreag* (1936) I. K. B. 83. In this case the injured man was knocked down by a motor car, rendered unconscious and died two days later without having recovered consciousness. Mac Kinnon J. held that the deceased having been unconscious and incapable of physical or mental pain had no cause of action in him to survive for the benefit of his estate and consequently refused to award damages for the shortening of the victim's life.

This is however, to be distinguished from the earlier case *Flint* Vs. *Lovell*. Here the plaintiff had, through the negligence of the defendant, sustained serious personal injuries whereby his expectation of life was considerably dimnished. It was held the Court of Appeal that damages might be awarded for shortening of his life and that this factor might be taken into account, not merely as an element tending to cause increased mental suffering, but as a separate head of damage.

(b) Damage Recoverable—The important thing which the Act of 1934 provided is that the damages are recoverable. However, where the injured party dies the damages recoverable for the benefit of the estate (i) shall not include exemplary damages, (ii) shall, where the death has been caused by the act or omission which gives to the causes of action, be calculated without any reference to any loss of gain to the deceased's estate consequent on his death, except that funeral expenses may be included. Where, the death unconnected with the act or omission which gives rise to the cause of action, it appears that substantial damages can be recovered even though the deceased himself, had he been alive when the action was brought, could only have recovered nominal damages.

(c) **Limitation Period**—By the Law Reform (Limitation of Actions) Act, 1945, the period of limitation will now be six years in most cases but three years in cases of personal injuries.

No proceeding in tort are maintainable under the Act against the estate of a deceased person unless either (*a*) the proceedings were pending against him at t' e date of his death or (*b*) proceedings are taken in respect thereof not later than six months after his personal re-presentative took out representation. The Act thus provides its own period of limitation so far as proceeding in tort against a deceased person's estate are concerned, and the general rules now contained in the Limitation Act 1939, as amended do not apply. Provided that the action is brought within the six month's period it does not matter that it would by then have been statute-barred if the deceased himself were still alive.

(d) **Subsisting action**—It may happen that cause of action is not compelete against a wrong-doer until after he has in fact died, as, for example, where the damage is the gist of the action and no damage is suffered until after the death of wrong-doer. In such a case no cause of action subsists against the wrong-doer at the date of his death and there is nothing to survive against his estate, so that, there were no provision in the Act to deal with the point the person suffering the damage would be deprived of his remedy.

Where the cause of action, as in negligence or disturbance of the right of support, does not arise until actual damage has been suffered and the wrong-doer dies before or at the same time as the damage is suffered there shall be deemed to be subsisting against him such a cause of action as would have subsisting if he had died after the damage was suffered.

(e) **Right of Action is Cumulative**—The rights conferred by the Act of 1934 are in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accident Acts 1946 to 1948 or the carriage by Air Act 1932.

Position under Indian Lwa—In India there is no statutory law of torts and the courts applied the maxim on the basis of the facts of each case. This would be seen from the following case.

In Secretary of State Vs. *Chunni Lal* (1910) XII Bom. L. 769, a Shroff was appointed by Government as an expert to pass Babashani Silver coins, on the occasion of withdrawing the Babashahi currency. The Shroff worked for a month, during which he accepted and passed as Babashahi 12,7120 Sukhai Coins. Those coins were finally passed on to the mint. The Sukhi Coins had long before that date ceased to be current and had only bullion value. Government having alleged that by Shroff's action, they suffered a loss of Rs. 1758-15-1, the Shorff paid them a sum of Rs. 1095. The Government, however, being of opinion that they still suffered a loss of Rs. 663-15-1 by the Shroff's action, filed a suit to recover Rs. 1095, which he alleged were wrongfully recovered from him. The District Judge dismissed both the suits, holding that what Government recovered from the Shroff was a full measure of compensation of their loss. Both parties appealed to the High Court. During the pendency of the Appeals the Shroff died and his son was brought on the record as his legal representative.

It was held that the maxim *actio personalis moritur compersona* had no application, since here the action rested on an obligation implied by law. As the Shroff undertook to pass only Babashahi Coins, it was an implied term of the controct that if he passed any other and Government suffered loss, he should make it good.

It was observed by the court that the application of the maxim *actio personalis moritur cum persona* is limited to actions in which remedy is sought for a tort, or for something which involves at any rate, the nation of wrong doing. It does not apply to an action in which compensation is claimed for injury to property on the strength of an express or implied contract.

In *Sharifa* Vs. *Munekhan*, plaintiff sued defendant for his tortious conduct in illegally depriving the plaintiff of the custody of his children. During the pendency of the suit defendant died, and his widow was brought on the record as his heir. It was held that the claim was in the nature of *actio personalis* and that, therefore, the cause of action did not at all, as the death of the defender survive as against his widow.

The Indian Legislature have attempted to provide against an indiscriminate application of the maxim. The Legal Representative Act (12 of 1855) allows an action to be maintained against the legal representative of a wrongdoer for damages for wrong committed within one year before his death.

Another below was given to the maxim by the Indian Legislature by the rule enacted by S. 89. Probate and Administration Act (36 of 1925) which provides.

"All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survives to and against his executor or administrator ; except cause of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of party ; and except also cases where, after the death of the party relief sought could be enjoyed or granting it would be nugatory".

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CHAPTER XII

PARTICULAR TORTS

Q. Give briefly the different classes of torts recognised by law.

Ans. **Classes of Torts**—Sir Fredic Pollock, while giving a definition of tort, observes .:

(a) it may be act which, without, lawful justification, or excuse is intended by the agent to cause harm, and does cause the harm complained of ;

(b) it may be an act itself contrary to law or omission of specific legal duty which causes harm not intended by the person so acting or omitting ;

(c) it may be an act, violating an obsolute right (especially rightsof possession and property) and treated as wrongful without regard to the actor's intention or knowledge. This, as we have seen is an artificial extension of the general conception which are common to English and Roman Law.

(d) it may be an act omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence have foreseen and prevented.

(e) it may be special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits, to avoid or prevent."

He gives the following classification of torts :

Group A

Personal wrongs

1. Wrongs effecting safety and freedom of the person : assault ; battery ; false imprisonment ;

2. Wrongs affecting personal relations in the family ; seduction, enticing away of servants ;

3. Wrongs affecting reputation, slander ; and

4. Wrongs affecting estate generally ; deceit ; slander of title, fraudulent competition by colourable imitation etc ; malicious prosecution ; conspiracy.

Group B

Wrong to Property

1. Trespass ;

(a) to land,

(b) to goods.

Conversion and unnamed wrongs *jusdem jeneris.*

Disturbance of easement etc.

2. Interference with rights analogous to property, such as private Franchise. patents. copyrights and trade marks.

Group C

Wrong to person, estate and property generally

1. Nuisance.

2. Negligence.

3. Breach of absolute duties attached to the occupation of fixed property, to the ownership and custody of dangerous things and to the exercise of certain public calling.

Winfield gives the following :

(A) **Wrongs to person :**

- (1) Death,
- (2) Assault and battery,
- (3) False imprisonment,
- (4) Residuary trespass to the person,
- (5) Injuries affecting family relation ;
  - (i) Husband and wife,
  - (ii) Parents and child.

(B) **Wrongs to reputation ; defamation including siander and libel.**

(C) **Wrongs to property :**

- (i) Trespass to land,
- (ii) Conversion and other wrongs to chattel.

(D) **Wrongs to person or to property.**

- (1) Deceit,
- (2) Negligence,
- (3) Nuisance,
- (4) Conspiracy, and
- (5) Breach of strict duties.

(E) **Wrongs of interference with freedom of contract or of business.**

(F) **Abuses of procedure ;**

(1) Malicious prosecution and civil procedure ; and

( ) Maintenance and champerty.

Sir Henry Finche gives the following classification :

(A) Torts relating to person are the following :

(1) Relating to body : (a) Assault (b) Battery (c) Mayhem (d) False imprisonment.

(2) Reputation : (a) Libel, (b) Slander.

(3) Freedom and reputation :

(a) Malicious prosection,
(b) Malicious civil action,
(c) Abuse of legal process.

(B) Torts to property are the following :

(1) Immovable Property :

(a) Trespass,
(b) Trespass *ab initio*
(c) Dispossession,
(d) Reversionary rights,
(e) Waste,
(f) Rights of casement ;
(g) Natural rights.

(2) Moveble Property :

(a) Trespass,
(b) Trespass *ab inltio,*
(c) Conversion,
(d) Detention,

Both Movable and Immovable :

(a) Slander of title,
(b) Slander of goods,
(c) Maintenance,
(d) Conspiracy.

(4) Incorporeal personal property :

(a) Patent,
(b) Copyright,
(c) Trade Mark,
(d) Trade name.

(C) Torts to Person and Property :

(1) Negligence,

(2) Nuisance,

(3) Fraud.

It would be seen from the above classification that various writers heve given different classification. There is no uniformity. However, classification given by *Sir Henry Finche* seems to be more scientific.

Q. Distinguish between Assault and Battery. (L. U. 1978)

Ans. Battery—Battery is the intentional application of force to another person. For the tort of battery it must be done with intention or negligence. If the action is done in a state of automation there might not be a battery. If the defendant knows he was doing it, it is no defence that by reason of mental incapacity or lunacy he did not know what he was doing was wrong.

Ratan Lal Dhiraj Lal has defined an **Assanlt** as "unlawful laying of hands on another person, or an attempt or offer to do a corporeal hurt to another Coupled with an apparent present ability and intention to do the act. Actual contact is not necessary in an assault though it is in a battery. But it is not every threat, when there is no actual personal violence, that constitutes an assault, there must in, all cases, be the means of carrying the threat into effect". In the case of *A. C. Cama* Vs. *H. F. Morgan* (1864) I. B. H. C. 205, 206] it was held that "Any gesture calculated to excite in the party threatened a reasoable apprehension that the party threatening intends immediately to offer violince or in the language of India penal code is about to use criminal, force to the person threatened, constitute, if coupled with a present ability to carry such intention into execution, an assault in law." The essential elements of assault are the intention as well as the act. "Therefore if one strikes another upon the hand or arm or breast in discourse, it is no assault, there being no intention to assault but if intending to assault strike at another and miss him, this is an assault ; So if he holds up his hand against another in a threatening manner, and say nothing it is an assault. The menacing attitude and hostile purpose go to make an assault unlawful e. g. presenting a loaded pistol at any one, or pointing or brandishing a weapon at another with the intention of using it, or riding after a person and obliging him to seek shelter to avoid being beaten". It is noteworthy that mere words do not amount to an assault. "But the words which the party threatening uses at the time may either give to his gestures such a meaning as may make them amount to an assault......".

A battery means "The actual striking of another person or touching him in a rude, angry, revengeful or insolent manner. A common assault whether or not including a battery is a misdemeanour.

—(OSBORN).

Distinction between assault and battery—Battery is an ententional application of force to anothe.ı person. Assault is an act of the defendant which causes to the plaintiff a reasonable apprehension of the infliction of a battery on him by the defendant. In battery it is not essential that there must have been bodily contact with the aggressor. If Ram throngs a piece of stone at B and the stone strickes B it is a battery although A has not touched B. Battery need not be accompanied by any bodily harm. The least touching of another in anger is a battery. To spit on a mans face is a battery "In both, motion is necessary, but while the application of unlawful force to another constitutes the wrong called for battery, an action which puts another in instand fear of unlawful force though no force be actually applied is the wrong called assault. In other words physical contact is necessary in battery whereas in assault mere fear of physical violence is enough.

Problem

Q. (i) 'B' points at 'A' an unloaded pistol. 'A' does not know that it is unloaded.

(ii) 'B' advances towards 'A' with the clinched first but is stopped by 'C'.

(iii) 'B' who is in a train moving out of station shakes his first at 'A' who is on the platform.

(iv) 'B', knowing a pistol to be loaded, points at 'A' and threatens to shoot him. 'A' believes the pistol to be loaded.

(v) 'B', as a joke upon 'A', disguises himself as a tramp and acosts 'A' on a lonely road, pointing an unloaded pistol at 'A' saying "Hand me over your purse or I shot."

(vi) 'B' during a quarrel with 'A' half draws his sword and says "if it were not day time, I would not have tolerated such language from you.

Is 'B' liable for assault in the above cases ?

Ans—(1) Assault involves reasonable apprehension of impact of something on one's body; and that is exactly what occurs when a firearm is pointed at by an aggressor. In *R.* Vs. *St. George* the question was whether accused could be convicted of a particular form of statutory assault if the weapon were unloaded. It was observed that it would be common law assault to point an unloaded pistol at a person at such a short distance that, if loaded, it might do injury.

In view of the above *B* shall be liable for an assault.

(ii) *B* is a liable. There may be liability for assault even if the the attempt to strike has been frustrated.

In *Stephens* Vs. *Mayers*, the plaintiff was in the chair at a Parisn meeting. The defendant who sat at the same table some six or seven paces away from the plaintiff, became angry and by a large majority it was resolved that he be expelled. He said he would rather pull the plaintiff out of the chair than be ejected and he advanced with clinched first upon the plaintiff but was stopped by the church warden who sat next but one to the plaintiff. He was held to be liable for assault.

(iii) *B* in this case does not appear to be liable. *A* cannot in the circumstances believe *B* has at that time ability to carry out his threat.

(iv) *B*, is liable. It is not necessary that defendant should be inspired by wrong motive to make him liable. It ought to be an assault whether pistol is loaded or unloaded unless the person at whom it is pointed knows it to be unloaded. In this case *A* believes the pistol to be loaded and, as such he is liable for assault.

(v) *B* is liable. It is not necessary that the defendant should be inspired by malicious motives to make him liable. It is enough if he causes reasonable apprehension of impact of something on one's body.

(vi) *B* is not liable to *A*. An act which normally be taken as indicating assault may be accompanied by words which make it clear that the act has no intention to strike the other. In such case, the plaintiff realises that the defendant has no intention of striking him and cannot be put in apprehension of a bodily contact.

In *Tuberville* Vs. *Savage* (1669) I Mod 3, the defendant put his hand to his sword and said "if it were not day time ; I would not take such language from you. It was held to be no assault.

Q. What is false imprisonment ? What are defendances for an action for false imprisonment ?

Ans. False imprisonment—Means to deprive a person of his liberty without lawful cause. It matters little as to for what time a person has been restrained from moving freely. Total restrain for a short period amounts to false imprisonment. It is the infliction of bodily restrain which is not expressly or impliedly authorised by law. In other words false imprisonment constitutes in the act of arresting or confining the movement of any person without lawful justification or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is.

The word "False" does not ignify "mendacious" or "Fallacious" but used in the less common sense of "erroneous" or "wrong". It is quite possible to commit the tort without imprisonment of a person in the common acceptance of that term. No physical contract or anything like prison is necessary. If a lecture looks his class in the lecture room after the usual time of the period, it would amount to be imprisonment. It would also mean false imprisonment if a man is restrained from leaving his house or any part of it or be forcibly detained in the public street.

Imprisonment is the restraint of a man's liberty whether it be in the open field, or in the stocks or cage in the street or in a man's own house as well as in the common goal. And in all these places the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go at all times to all places.

Knowledge of Plaintiff—The tort of false imprisonment is committed even if the plaintiff did not know that he was being detained. A person could be imprisoned without his knowing it. A person can imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconcious and while he is a lunatic.

In Meering's case, the plaintiff was suspected of stealing a key. of varnish from the defendant, his employer. The plaintiff was asked by two of their policemen to go with them to Company's office. He assented and at his suggestion they took a short cut there. On arrival he was taken or invited to go to waiting room, the two policemen remaining in the neighbourhood. In an action for false imprisonment the defence was that the plaintiff was free to go where he liked, that he knew it and that he did not desire to go away. It was held by a majority of Court of Appeal that the defendants were liable because the plaintiff from the moment that he came under the influence of the police he was no longer free man.

Restrain must be complete—The tort of false imprisonment is not committed unless motion is restrained in every direction. In *Bird* Vs. *Jones* (1845) 7 Q. B. 742 the defendant wrongfully enclosed part of the public footway on Hammersmith Bridge, put seats in it for the use of spectators of a regatta on the river, and charged for the admission to the enclosure. The plaintiff insisted on passing along this footpath, and climbed over the fence of the enclosure without paying the charge. The defendant refused to let him go forward but he was told that he might go back into the carriage way and cross to the other side of the bridge if he wished. He declined to do so and remained in the enclosure for half an hour. The defendants held not to have committed false imprisonment.

Means of Escape - If a person has a means of escape, but does not know it, it is submitted that his detention is nevertheless false imprisonment unless any rearonable man would have realised that he had an available outlet. Thus if *A* pretends to lock a room inside in which *B* is sitting and *A* takes away the key, it would seem unreasonable if *B* makes no attempt to see whether the doors are in fact locked

Voluntary confinement—A refusal to liberate a party from voluntary confinement is not a false imprisonment if there is no legal duty to effect such liberation. In *Herd* Vs. *Weardate Steal Cool and Coke Company* (1591) A. C. 67 a minor went down a mine to work for a certain time in accordance with the terms of his employment. Before the time had expired he stopped working, alleging that the jobe to be done was dangerous, and demanded to be taken to the surface again. His employer refused to take him up again promptly, although, they ultimately took him up before the expiration of the period for which he should have worked. It was held by the House of Lords that there had been no false imprisonment.

(1) **Reasonable condition**—If a man does not fulfil reasonable condition and he is prevented from leaving the house it would not amount to tort.

In *Robinson* Vs. *Balmain Ferry Co. Ltd.*, the plaintiff paid a penny for entry to defendant's wharf from which he proposed to cross the river by one of the defandant's ferry boat. A Boat had just gone and, as there was not another one for twenty minutes, the plaintiff wished to leave the wharf and was directed to the ternstile which was its exit. There he refused to pay another penny which was chargeable for exit, as was written on a notice board, and the defendant refused to let him leave the wharf unless he did pay. The Judicial Committee held that this was not false imprisonment.

In *Herd* Vs. *Weardable, etc. Ltd Co.* a minor in breach of contract of employment refused to do certain work allotted to him and wanted to be taken to the surface by the lift. The defendant refused to do so but brought him out just after working hours. The defendants were held not liable.

(2) **Reasonable and honest belief**—It is also a common defence about arrest for a crime if the circumstances justified the arrest, it is no tort of false imprisonment.

In *Dalison* Vs. *Coffery* a theft had been committed, the defendant police offier recived reliable informations that the plaintiff had been identified as the man responsible. It was that arrest was held justified. In *Jogg* Vs. *Word* (1858) 27 L. I. Ex. 443 a police constable arrested the plaintiff on a mistaken charge of theft. The constable did not make any enquiry from the plaintiff. He was held liable.

(3) **Power to Arrest**—A constable or any other police officer may arrest a person on the the ground that he had reasonable cause for suspecting that he had committed a crime even though in fact no crime had been committed by anybody.

Problem

Q. 'X' a Police consiable arrested 'Y' without warrant for an alleged crime. He did it under the mistaken impression that a local statute authorised arrest without warrant. Can 'X' be held liable for false imprisonment ?

Ans. There were similar facts in the case *Christie and Another* Vs. *Leachinsky* (1947) A. C. 573, the police arrested the respondent without a warrant for an alleged misdemeanour. They did under the mistaken impression that a local statue authorised arrest without a warrant. When sued for false imprisonment, they pleaded that they had reasonable grounds for suspecting that the respondent had also committed the felony of larceny. The House of Lords held that the plea was bad because the police had not informed the respondent of any charge of larceny.

Q. On what grounds trespass to the person may be justified ?

Ans. The following are the justification of trespass to the person :

(i) Assault and battery is justifiable if committed in selfdefence. But it must have been committed in actual defence but not afterwards by way of retaliation. For instance *A* strikes *B* with a cane. *B* by reasonable force disarms *A*. *B* is not privileged thereafter to inflict a similar beating upon *A*.

(ii) Assault and battery is justified if committed in defence of property.

(iii) Assault and battery and imprisonment may be justified as being done in the lawful exercise of parental or other authority.

(iv) Imprisonment may be justified as being done by Judicial authority.

(v) Imprisonment may be justified.

CHAPTER XIII

ABUSE OF LEGAL PROCEDURE

Q. What is malicious prosecntion ? What are the essentials of malicious prosecution ?

Ans. Malicious Prosecution—Malicious unsuccessful prosecution and without rensonable cause constitute tort of malicious prosecution. It means when a person is prosecuted by another and the former goes scotfree and the case was instituted without any sound ground it is said that person was maliciously prosecuted.

The essentials of malicous prosecution are the following :

(a) The plaintiff should prove that he was prosecuted by the defandant.

(b) He should also prove that the prosecution was decided in his favour.

(c) It should also be proved that it was without reasonable and probable cause.

(d) That is was malicious.

(a) Prosecution—A prosecutor is one who has put the law in force. In other words to prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person who enjoys judicial authority in regard to the matter in question. For prosecution it is not enough to lay information before the magistrate because the magistrate might refuse to grant a summon. And unless summons are issued it cannot be said that prosecution has been commenced.

In *Mohd. Amin* Vs. *Jogendra Kumar Banerjee* (*1947*) *A. L.*, the defendant had filed a complaint before a magistrate charging the plaintiff with cheating. The magistrate thereupon examined the complainat on oath and made an enquiry under Section 202 of the Cr. P. C. Notice of the enquiry had been issued to the plaintiff who attended it without counsel and incurred cost in doing so. The magistrate finally dismissed the complaint the under Section 203 of the Code. In these circumstances the Privy Council held that there was a prosecution. "The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution, the test is whether such proceedings have reached a stage at which damages to the plaintiff results."

(b) That the prosecution was determined in his favour—"It is a rule of law that one shall be allowed to allege of a still Depending suit that is unjust." In other it will have to be shown by the plaintiff that prosecution ended in his favour and no man could say that the prosecution is malicious and false if it is still pending ; the proceedings were to the legal end. The end need not however be final and conclusive one.

(c) Without reasonable and probable cause—The suit for malicious prosecution shall fail if it has no reasonable and probable cause. Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified.

In *Hicks* Vs. *Faulker* (1878) 80 B. D. 167 Hakwins said "I should define reasonable and probable cause to be honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, the existence of a state of circumstances which assuming to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of caused, to the conclusion that the person charged was probably guilt of the crime imputed.

In *Tempest* Vs. *Snowdown* (1952) I. All. ER. 1, the plaintiff as salesman had been in the service of a company. The defendant was the chairman of the board of directors of that company. The company was concerned in the business of selling such articles as burglar alarm, amplifiers and the like. In May 1950 the defendant laid an information before the magistrate as a result of which two summons were served on the plaintiff charging him, no one summons, with larceny as a servant of burglar alarm apparatus etc., and on second summons, with fraudulent conversion of the same articles. After an adjourment of the first summons came on the hearing the magistrate took the view that there was no evidence to support it, and he therefore dismissed the summons without calling on the plaintiff to answer the charge made against him. The second summons for fraudulent conversion was not proceeded with. The plaintiff then issued the writ in the present action for malicious prosecution, claiming general damages and as special damages pound 5, 5's cost which the plaintiff had to pay to his solicitor in excess of what he recovered from the defendant.

It was held that defendant was not honest in taking the proceeding he did and that he acted out of malice.

(b) Malice—The suit for malicious prosecution will succeed only when it isproved that the proceedings were instituted maliciously *i. e.*, some wrongful motive. In *Mitchell* Vs. *Tenkins* it is said, "The term malice in the form of action is not to be considered in the sense of spite or hatred against an individual but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives.

In *Balbhaddar Singh* Vs. *Badri Shah* (1920) AIR P. 46 the appellants and respondents were Lambardars and the principal inhabitants in the village of Mohiuddinpur. One Sheo Bux was murdered on September 17, 1919. The next day Raghunath went to the nearest police station Pagawan about two miles from the village and lodged a report, making a confession that he had murdered Sheo Bux at the intance and with the help of one Balbhaddar Singh who was rival Zamindar of Raghunath's master Badri Shah. The police challaned both Balbhaddar Singh and Raghunath but the criminal court dischared the one and aquitted the other.

Balbhaddar Singh then sued Badri Shah, in the Civil Courts for damages, proving the defendant's malice towards him and that Raghunath had implicated him in the confession at the instance of the defendant.

Badri Shah was not liable for the tort of malicious prosecution as all the ingredients of the tort are present except that Badri Shah was not the person who prosecuted the plaintiff unless it is so established, Badri Shah can not be held liable.

The Privy Council, laid the following points :

(a) In an action for malicious prosecution the plaintiff has to prove that he was prosecuted by the defendant ; that the proceeding complained terminated in favour of the plaintiff, if from their nature they were capable of so terminating that the prosecution, was instituted against him without any reasonable and probable cause and that it was due to a malicious intention of the defendant and not with a mere intention of carry the law into effect.

(b) The question is not: "Did the plaintiff commit the offence"? or "Did defendant invent the offence against the plaintiff", the two querries exhausting the possibilities of the situation. The question is "Has plaintiff proved that the defendant invented and instigated the whole proceeding for prosecution."

(c) In any country, whereas in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the world could not be raised against any private individual. But given information to the authorities which naturally leads to prosecution is just the same. And if that is done and trouble is caused an action will lie.

Q. Distinguish between false imprisonment and malicies prosecution. **(L. U. 1978)**

Ans—Malicious prosecution is a tort consisting of institution of criminal or bankruptcy proceedings against another maliciously and without reasonable and probable cause, by which that other suffers damage to his fame, person or property, provided that the proceedings terminate in the other's favour, so far as that may be possible.

False imprisonment on the other hand means the confinement of a person without just cause or excuse. There must be a total restrainst of the person ; and the onus of proving reasonable cause is on the defendant.

The malicious prosecution and the false imprisonment both are tort and they differ from each other in the following respect. In other words the distinction between the two may be explained as below :—

Malicous Prosecution	False Imprisonment
1. This is wrongfully setting the criminal law in motion.	1. This means wrongfully restraining the personal liberty of the plaintiff.
2. In malicious prosecution the arrest is secured under judicial sanction.	2. In the case of false imprisonment the personal liberty of the plaintiff is wrongfully restrained by a private individual either personally or by setting a ministerial officer in motion.
3. Malice is essential ingrediant in malicious prosecution.	3. Malice is not an essential ingrediant in false imprisonment.
4. The plaintiff has to prove the existence of reasonable cause as his justification.	4. The defendant is required to prove affirmatively the existence of reasonable and probable cause as his justification.

In the case of Garikipati *Rmayyaa* Vs. *Araza Biksham* and another [AIR (1979) A. P. 31] it was held that in the case of Tort of malicious arrest or false imprisonment, it is not nesessary for the plaintiff to prove malice or negligence on the part of the defendant. It is, sufficient if he proves that false imprisonment was caused by the defendant and if the defendant cannot establish sufficient justification, he would be liable. If the defendant has made a false report on the strength of which the arrest was made it cannot be held that there was justification for the arrest even though he did not take any active part in the arrest of the person concerned.

In *Austin*, Vs. *Dowling* (1870) R. L. 5 C. P. 534 where an Inspector of Police refused to take the responsibility of arresting *B* on charge made by *A* unless *A* signed the charge-sheet, it was held that *A*'s was false imprisonment because the Inspector had interposed no discretion of his own between the *A*'s charge and the arrest that followed.

In this case distinction was made between the two as follows :—

"The distinction between false imprisonment and malicious prosecution well illustrated by the case where, parties being before the magistrate one makes a charge against another, where upon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion, but a judicial Officer. The opinion and judgment of a judicial officer are interposed between the charge and imprisonment.

The reason for this distinction is, says Salmond that a man cannot be sued in trespass, and so not for false imprisonment unless he himself, whether personally or by his agent, has done the act complained of. A court of justice, however, is not the agent of the litigant, but acts in the exercise of its own independant judicial discretion.

(i) Therefore the act of a court of justice cannot be imputed to the litigant at whose suit they have been done. The litigant can be charged only with having maliciously and without reasonable cause exercised his right of setting a court of justice in motion.

(ii) In malicious prosecution plaintiff can succeed only if he proves : (a) he was prosecuted by the defendant (b) that the prosecution ended in his favour (c) that it was without reasonable and probable cause (d) that it was malicious. In an action for false imprisonment liability is created in general even by honest and inevitable.

(iii) In false imprisonment the burden of proof lies on the defendant that he imprisoned the plaintiff on the basis of the reasonable and probable cause. The defendant should prove that his act of imprisonment was lawful. In malicious prosecution the burden is on the plaintiff to prove that he was prosecuted without reasonable and probable cause.

(iv) In an action for false imprisonment it is not necessary for the plaintiff to prove that the defendant was actuated by malice.

(b) In this case *A* honestly believes that his watch was stolen by *B* and he prosecuted him. *B* cannot sue *A* for malicious prosecution.

It is true that *B* was prosecuted by *A* and he was acquitted. Thus two conditions for suit of malicious prosecution by *B* are there. But *A* prosecuted him in honest belief that *B* has stolen his watch and thus the prosecution started by *A* was not without reasonable and probable cause. The probability or improbability of *X* having stolen my purse remains the same though I dislike *X*. Similarly here is no question of personal liking and disliking. There was no malice. The term Malice in this form of action is not to be considered in the sense of spite or hatred against an individual. There was no malice on the part of *A* in prosecuting *B*.

A is not liable for malicious prosecution.

CHAPTER XIV

TORTS AFFECTING FAMILY RELATIONSHIP

Problems

Q. 'A' was in intimate terms with 'B's wife for six years. After a quarrel between 'B' and his wife, 'A' persuaded 'B's wife to leave her husband and she then letf 'B's house. Can 'B's, recover damages from 'A'?

Ans.—In *Place* Vs. *Scarle* (1932) 2 K. B. 497, the plaintiff brought an action alleging that defendant who was on terms of intimacy with the plaintiff's wife for six years, persuaded his wife to leave him, after a quarrel between the plaintiff and his wife, and they left the plaintiff's house. The defendant was held liable for depriving the plaintiff of the consortion of his wife.

In the above case *A* shall be liable for depriving *B* for the consortion of his wife and *B* can recover damages.

Q. 'B', a workaman is injured by a defective crane supplied by his employer, 'A'. Thereby 'B' loses virlity. 'B's' wife is thereby deprived of prover consortium. Can 'B's' wife maintain an action against 'A'?

Ans – In *Best* Vs. *Samuel Fox & Co. Ltd.* and other (1952) A. C. 716, the plaintiff a woman maintained a suit defendants, for causing injury to her husband while he was in their employment. On account of injuries the husband became sexually impotent and thus the plaintiff lost her husband's consortium. It was held that the plaintiff had no remedy.

The claim of the plaintiff was based on two grounds. First on the action of enticement in which either spouse can sue for the deprivation of the other's consortium, and secondly the old action of the husband for the loss of his wife's consortium. For the first ground it was laid down that it was necessary to show that there was intentional interference with the consortium, and which could not be proved here. The evidence showed that the defendant had no idea that the plaintiff's husband was married and that there was nothing unreasonable in not knowing so. For the second ground it was said that the plea is confined only to the husband and cannot be extended.

In the present case '*B*'s' wife cannot maintain action against *A* as there was no intentional interference with the consortium.

Q. (a) 'A' did not know a woman to be married and commits adutery. Can the husband of the woman claim damage ?

(b) What is the basis of claim for damages of a father for seduction of his daughter ?

(c) 'F', father of 'D', a sixteen year old girl, sends his daughter to Caleutta to take up a job. 'D's' services are suddenly terminated without her father's knowledge. While returning to Lucknow she is seduced by 'Z'. 'F' sues 'Z'. Decide giving reasons.

Ans. (a) In *Butter Worth* Vs. *Butterworth* (1920) L. T. 804 it has been laid down that is not usual for damages to be awarded against an adulterer where he did not know the woman to be married but in strict sense such ignorance is no bar to damages and the damages will be awarded in spite of it. Thus a man can be held liable for adultery even if he did not know the woman to be married with whom he commits the wrong.

(b) It has been observed in *Grinnell* Vs. *Wells* "The foundation of the action by a father to recover damages against the wrong doer for the seduction of his daughter has been uniformly placed from the earliest time hitherto not upon the seduction itself which is the wrongful act of the defendant, but upon the loss of services of the daughter in whose services he is supposed to have a legal right and interest. Thus the basis of claim of damages by father for his daughter's seduction is not the wrongful act of the defendant but his deprivation of the services of his daughter.

(c) *F* can recover damages from Z. It is the established law that relation between a child and father is those of a master and servant. If father is deprived of the services of his daughter he can recover damages, for the same. It is immaterial whether father exercises his right of utilising the services of daughter.

In *Terry* Vs. *Hutchinson* (1868) L. R. 30, B. 599 the daughter who was nineteen years of age was employed by a draper at Deal. He dismissed her and on her railway journey to Counterbury where her home was, she was seduced by the defendant. A verdict of pound 150 damages for her father was upheld.

CHAPTER XV

DEFAMATION

Q. "Defamation is the publication of a statement which tends to lower a person in the estimation of a right thinking members of society generally or which tends to make them shun or avoid that person". Critically examine this statement.

Ans. Defamation—This definition of the term "defamation" has been given by Winfield. This definition is considered more scientific.

Many writers define defamation simply as the publication of the statement which tends to bring a person "into hatred, contempt or ridicule." But this is not the fact. A statement may be defamatory even if it does not excite in reasonable people feeling quite so strong as hatred, contempt or ridicule. This definition is also defective because it does provide any suggestion for the terms "tending to shun or avoide" included in the definition given by Winfield.

There may be circumstances where a reasonable man instead of feeling harted, contempt or ridicule may tend to shun or avoid the company of the person defamed. For example falsely imputing inslovency or insanity to man is defamation without doubt but it would hardly tend to raise the feeling of hatred contempt and ridicule in a reasonable person who may instead feel pity and sympathy for the person. But such a reasonable man may be inclined to shun or avoid. The society of the person who has been declared insolvent or lunatic.

Slesser, L. J. took this view in *Joussoupoff* Vs. *Metro-Goldwy-Mayor Pictures Ltd.* (1935) 50 I. L. R. R. 581 where the defendant by means of a talking cinematograph film falsely imputed the plaintiff, a Russian Princess, had been raped by Raspution Russian monk. In an action for libel the jury returned a verdict of Pound 250.0 damages for the plaintiff. In the opinion of Slesser L. J. the behaviour of the notorious monk tended "to make the plaintiff to be shunned and avoided and that without any moral discreet on her part.

The above observation makes it clear that defamatory statement in order to make the defendant liable should be such as imputation of which make the defamed person to be avoided and shunned by the reasonable man of the society.

A statement which disparages a man in his reputation in relation to his office, profession, calling and trade or business may be defamatory. For example the imputation of such quality would be deterimental or the absence of such quality as is essential for any trade, profession or calling. Where A is imputed of the want of ability or is declared incompetent for certain employment, it would amount to defamation. In this case no reasonable man would feel hatred, contempt or ridicule. People may avoid the company of person who is known as incompetent or who has been proved incapable of discharging the job entrusted to him.

On account of a defamatory statement a person is expected to go down into the estimation of right thinking man. The feeling to shun or avoid arises in a right thinking man. This does not include the persons who are cynical or censorious. A cynical man may think nothing worse of a man whatever was imputed to him. On the other a censorious man would consider a trivial accusation as something which has damaged the whole reputation of a man. It is not these types of man, but the ordinary citizen, whose judgment must be taken as the standard. The reasonable man should be the person who is neither too much conscious about every thing nor so reluctant as not to notice the happenings of the society.

The question, as Lord Atkin suggested is'— would the words tend to lower the plaintiff in the estimation of right thinking members of society generally ? So if the plaintiff can prove only that the statement tends to lower the plaintiff's prestige or discredit him with one special class of persons, it is not defamatory unless reasonable people in general would take the same view. Suppose that *A* is a member of a club which bans the wearing of a coloured shirt and that *B* falsely acuses him of openly wearing one.

That may tend to make *A* unpopular with members of the club, but *B* has committed no defamation ; had *A* been accused of misappropriating the club funds, the case would have been otherwise. For while right minded persons in general are indifferent to the colour of other peoples cloth, but they do not like dishonesty at any cost and from any one. In breaking the rules of a club there is nothing like dishonesty and the imputation of such thing would not amount to defamation.

Q. Distinguish between libel and slander. What is the distinction between the two in Indian Law ?

Ans. Libel and Slander—The wrong of defamation is of two kinds (i) libel (ii) slander. When a defamatory statement or represention is made in permanent form it is called libel. Examples of libels are picture, statute, wax work, effigy or any writing, print, mark or sign that can be seen. The word "permanent" should not be taken too carefully. Perhaps sky writing by an aeroplane would be libel although vapour which composes it disappears soon. In slander, the, defamatory statement is made in spokkn words or in some other transitory from whether visible or audible. The defamation in the manual language of the deal and dumb and gesticulation would be slander because the movements are more transient. These examples show that these two bends of defamation are distinguished by saying that libel is addressed to the eyes and slander to ears.

If an oral saying is communicated orally it is slander so if the written statement by *A* is written down by *B* and shown by *B* to *C*, it is libel, not a slander, that *B* has published. Conversely if *A* wtites to *B* a letter defamatory of *X* and *B* rceads it aloud to *C*, is ought to be slander that is published by *B*.

Libel, if tends to provoke a breach of peace is a crime as well as tort. Slander is never criminal, although spoken words may be punishable as being treasonable and seditious.

Libel is actionable *per se i. e.*, without proof of special damage. In slanders special damage must be proved.

Indian Law—Both libel and slander are criminal offences under the Indian Penal Code (S. 499 I. P. C.) and also actionable without proof of special damages.

Q. Whether the following are libel or slander :

(a) Talking film.

(b) Gramophone record containing defamatory statement.

(c) Broadcasting from radio.

Ans. (a) A defamatory matter as expressed in a talking film has been regarded as libel because it is addressed to the eye and is of permanent nature. Slesser L. J. in *Youssonpoff* Vs. *M. C. M. Pictures Ltd.* observed "There can be no doubt that so far as the photographic part of the exhibition is concerned, that is permanent matter to be seen by the eye and is the proper subject of an action for libel, if defamatory.

(b) Gramophone recorded containing defamtory statement is considered slander. No doubt a record is a permanant form. But a record does not communicate the statement unless needle is applied. When the needle is applied to the record the defamatory statement comes out and it is just like a speech and hence slander.

In *Chiken* Vs. *Ham*, a Gramophone record was made by Ham. This record contained many abuses and uncomplementary statement for Mr. Chiken. Ham sent this record to Chiken as a Christmas present. Mr. Chiken at a gathering of his friends put the record on his own gramophone. As soon as needle was applied to it, there was defamatory statements addressed to Chiken. Chiken filed a suit. The Court of Appeal held that it was slander.

(c) Defamatory matter it broadcast has been regarded as slander. *In Bergan* Vs. *Macadam*, it was held to be slander.

Q. "Liability for libel does not on the intention of the defamer but on the fact of defamation." Comment.

Ans. Liability For Libel On What it depands—In an action for libel, all that the plaintiff has to prove is that the statement complained of contains the following components :

(i) It is false,
(ii) It is in writing,
(iii) It is defamatory and refers to the plaintiff,
(iv) There is the publication by the defendant.

A publication need not be intentional. It is sufficient if it is due to the negligence of the defendant. But if there is no intention to publish a defamatory statement and the same has been published without the negligence of the defendant no action will lie. Thus a publicalion to the wrong person by mistake is a ground for action. A person cannot absolve himself of the responsibility on the plea that the lible was published by accident, mistake or jest. It is sufficient if it is due to the defendant's negligence *e. g.*, circulating a book containing the libellous statement. Every repetition of defamatory words is a fresh publication and thus creates a new course of action. This can be made more clear by the publication of a lible in a newspaper, in which case, not only the writer of the libellous article is liable but also the editor, the printer, the publisher and the proprietor.

In the case of printers the liability is attached to them whether the matter is published with or without knowledge. The mere fact that the proprietor of a paper had no knowledge of the publication of libel in his paper connot absolve him from being held liable. *Munish Ram* Vs. *Mela Ram Waja* and others, A. I. R. 1936 Lahore 23, the proprietor of a newspaper was held liable which appeared in its columns even though the publication may have been made in his absence, without his knowledge and contrary to his orders.

In *Dina Nath* Vs. *Sayad Habib*, A. I. R. 1929, it was observed that there were other class of publishers who do not play a primary part in the publication *e. g.*, a newspaper vendor, bookseller and the klie. They are publishers in the sense that they disseminate or distribute the matter already published by the original publisher. Such persons are, however, not liable for the acts of publication if they are "innocent" in the sense now to be described. It is defence to a person who is not a printer or the first or the main publisher of what I may call a subordinate part in disseminating it if he succeeds in showing (i) that he was innocent of any knowledge of the libel contained in the work disseminated by him (ii) there was nothing in the work or the circumstances under which it came to him, or was disseminated by him which ought to have led to suppose that it contained a libel, and (iii) that when the work was disseminated him, it was not by any negligence on his part that he did not know that it contained libel.

It *Vizetelly* Vs. *Mudia Select Library Ltd.* (1900) 2 K. B., where proprietor of a circulating library was held to be mechanical distributors to whom this special rule would apply if they were proved to be innocent. Besides news vendors, booksellers and circulating libraries, a poster delivering parcels have been held within this rule. No doubt persons lending books gratutiously or making gifts of them and gramophone dealers are also protected. Section 19 Crown Proceeding Act 1947 of England exempts both the Crown and its servants from any liability in tort in respect of postal packets including telegrams and the telephone services.

A person charged with libel cannot defend himself by showing that he intended in his best not to defame. There can also be no doubt that a person who has no actual knowledge that his statement is defamatory may still be liable. It is usually stated that liability at common law is absolute, that if the statement is in fact defamatory, it matters not whether the defendant could have taken the steps to discover that the statement was defamatory.

The Defamation Act 1952 of England has greatly influenced the law on the subject. The Act provides that the publisher of an innocent defamation, in certain circumstances may make an offer of amends defined in the Act. Section 4 (5) provides that the words shall be treated as published "innocently". If and only if the following conditions are satisfied *i. e.*, to say "(b) that words were not defamatory on the face of them and his publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person and that the publisher exercised all reasonable care in relation to the publication ; and any reference in this sub-section to the publisher shall be construed as including a reference to any servant or agent of his, who was concerned with the contents of the publication."

An offer of amends—defined by section (4) (3) means :

"(a) In any case to publish a suitable correction—a suitable apology to the party aggrieved (b) where the copies of a document or a record containing the said words have been distributed by or with knowledge of the persons making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to defamatory of the party aggrieved."

According to the Defamation Act of 1952 a defendant can take the plea of innocent only, if (1) the words published by him were not defamatory on the face of them ; (2) he did not know of the circumstances by virtue of which the statement might be understood to be defamatory of the plaintiff, (3) he published a suitable correction, a suitable apology to the plaintiff, (4) and where the copies of a document containing the defamatory matter have been distributed he took such steps as were reasonable practicable for notifying persons, to whom copies have been distributed that the words are alleged to be defamatory of the plaintiff.

It is libellous to write and publish of a man that he is characterless or, a man of no morals ; or a man unfit for any trustworthy job or an obituary notice of a living person or an ironical and satirical praise. In the case of *Cassidy* Vs. *Daily Mirror newspaper* (1929) 2 K. B. 331, the newspaper published a photograph of one Mr. *X* and Miss *Y* together with the words, "Mr. *X* the prize winner and Miss *Y* whose engagement has been announced." The wife of Mr, *X* brought an action saying that the publication conveyed meaning defamatory to the plaintiff that she was not the lawful wife of Mr. *X* and was living with him in immoral co-habitation. The jury found the morals did reasonably bear a defamatory meaning and awarded the plaintiff Pound 500 damages.

Q. Are there any exceptions to the rule that slander is not actionable *per se i. e.*, without proof of special damages ?

Ans. Exception to Rule—Slander Not Actionable ***Per se*—** Slander is not actionable without proof of special damages, but the following are the exceptions where slander is actionable *per se.*

(1) An imputation—that the plaintiff has committed a criminal offence—Slander is actionable without proof of special damage if it implies the commission of a crime which is punishable with at least imprisonment in the first instance. The imputation must be direct and it will be necessary for the plaintiff to satisfy that words uttered by the defendant were such which were absolute affirmation of guilt. It is not however, essential that the exact offence should be specified. For example "you have committed an act for which I can transport you". In these lines exact offence has not been uttered.

(2) An Imputation that the plaintiff suffers from an existing contagious venereal disease—It has been a rule of common law that merely an imputation of contagious disease is actionable *per se*, "all prudent person will avoid the company of a person having such a distemper" and that it makes no difference whether distemper is due to "Visitation of God. accident, or to the indiscretion of the party therewith afficted." On this basis imputation of leprosy, venereal disease etc, has been held actionable *per se.*

(3) An imputation of unchastity against a woman—The exception in English Law is now provided by a statute, namely Slander of Woman Act, 1891 that words spoken or published which imputes unchastity or adultery to any woman or girl shall not require special damage to render them actionable.

(4) An imputation against the plaintiff in the way of his business—Imputation of unfitness, incompetence or dishonesty in a man's calling or officer are actionable *per se*. The plaintiff has got a right of action for any defamatory imputation upon his calling or profession. For example a charge of insolvency upon a trader or a game-keeper one of whose duties was to preserve foxes had a good cause of action against a defendant for saying that he had poisoned foxes and an engineer-fitter for the statement that he was grossly unskilful workman.

In *Jones* Vs. *Jones* and Another, the plaintiff who was a headmaster of a school, sued the defendant for slander in falsely imputing him immoral conduct with a woman employed as a cleaner at the school. He proved no special damages. The jury returned a verdict of Pound 10 for general damages but the Court of Appeal reversed the Judgment and which was confirmed by the House of Lords. This was done because of the fact that the special damages must be proved if the imputation does not relate to his conduct in the office or is unconnected with his official duties although the imputation naturally tends to injure him in his profession.

It is necessary that to get the benefit of this exception the plaintiff must prove that at the time of slander he was engaged in the office, but it is possible that he may be engaged in more than one profession. Thus in *Bull* Vs. *Vazquez* the plaintiff was member of Parliament as well as employed in the army and wounded on active service. He was absent from the army on indefinite parliamentary leave "but was within the service of army. The defendant said to him, "I do not believe he was wounded. In my opinion he was sent home for drinking too much spirit". It was held slander actionable *per se*.

Q. Elucidate with illustrations the essential elements of defamation. (L.U. 1978)

Ans. Essential elements of defamation—There are four essential elements of defamation may be enumerated as below :—

1. Malice.
2. Defamatory words.
3. The words must refer to the plaintiff.
4. There must be publication of words.

Now we take up these one by one :—

1. Malice—Malice normally means any of the following things :—

(a) Intentionally doing a wrongful act without a just cause.

(b) Doing an act with evil motive.

(c) It may mean carelessness or even honest mistake.

Malice is an essential element of defamation and has to be proved by the plaintiff alleging that the defendent published defamatory matter. If the act is wrongful, it will be presumed that it was published with malicious intention. If the act is done with utter carelessness or if .it is done with honest mistake, the element of malice would be considered to be present for example in the case *Morrison* Vs. *Ritchie* & *Co.* a newpaper published that the plaintiff who was married only two months ago gave birth to twins This news item was in fact erroneously published and the publisher believed that the material he was publishing was true. Thus although it was a case of bonafide error or mistake yet the publisher was held liable for publishing the defamatory matter.

2. The words published must be **Defamatory**—This means they must be untrue with respect to the person they are published. They must amount to an invasion of an individual's interest in reputation and good name.

3. **The words must refer to the plaintiff**--The defamatory statement must refer to plaintiff. It is not necessary that the name of the plaintiff may be mentioned in the defamatory matter published by the defendant. If the published matter is such that it can lead people to think that it refers to such and such person it will amount to defamation if the matter is defamatory.

In *Hulton* & Co. Vs. *Jones* (1910) A. C. 20, H. & Co. were newspaper proprietors and published in their paper a humorous account of a motor festival at Dieppe in which imputation were cast on the morals of one Artemus Jones, a church warden at Peakham. This person was intended to be and was believed by the writer of the article and the editor of the paper to be purely fictitious. In fact there was barrister named Artemus Jones, who was not a church warden, did not live at Peakham and had taken no. port in the Dieppe festival. He sued H and Co for libel and his friends swore that they believed that article referred to him. The Jury returned the verdict for for the plaintiff and the Houre Lords confirmed it. They held that if reasonable people would think the language to be defamatory of the plaintiff it was immaterial that the defendant did not intent to defame him.

In *Newstead* Vs. *London Express Newspaper Ltd.*, "Harold Newstead thirty years old Camberwell man', had been convicted of bigamy. This was true of a Camberwell barmen of that name, but it was untrue of the plaintiff, Harold Newstead ~~about thirty who assisted~~ his father ~~in a hair dressing business in Camberwell. The defendant~~ was held liable. The Court of Appeal held that (a) the principle applies where the statement truly relates to a person *A*, and is mistakenly but reasonably thought to refer to another real person *B*; (b) because of negligence on the defedant's part is relevant only in the sense that it may be considered by the Jury in determining whether reasonable people would regard the statement as referring to the plaintiff, otherwise it is no defence.

(4) **The words must be published**—In order to succeed in an action for defamation is also essential for the plaintiff to prove that the defamatory statement has been published. By publication means i.e, that in the statement was made known to any persons or person other than ~~than~~ the plaintiff himself. ~~For~~ By publication it is not meant that in the ordinary sense it should be made public but even a private and confidential communication to a single individual is sufficient. It was held in *Eglantine Inn* Vs. *Smith* (1948) N. 129 that the printers did not publish a libel when they handed printed hand-bills in parcel to author ~~another~~, nor is the handing back to the employer by the clerk. There is, of course, publication to the printer, clerk or typist by another or the employer in such a case when the document is handed over or the matter is dictated to them.

If the defamatory matter when it is made known to a person is not intelligible to him *i. e.*, when it is expressed in a foreign language which is not known to him, or that he is blind or deaf, it does not amount to publication. Publication will not be complete if the man does not understand that it relates to the plaintiff. In *Sadgrove* Vs. *Hale*, the defendant sent to a third person a post-carn containing a defamatory matter relating to the plaintiff. The name of the plaintiff was not mentioned in it and no stranger unacquainted with the circumstances would have known to whom it referred. It was held that there was no sufficient publication to the postman or other persons through whose hands the post-card passed. There is no publication of the defamation if it is communicated through a third persons whose act was neither authorised nor could have been reasonably anticipted by the defamer.

The publication may be joint. "Where defamatory matter is contained in a book, periodical, or newspaper there are normally a series of publications each of which constitutes a separate tort. First, there is publication by the author to the publisher for which the author is solely liable. Secondly, there is the puclication by the author and publisher jointly to the printer for which the author and publisher are jointly liable.

The publication must be intentional or negligent. Thus a publication to the wrong person by mistake is a ground for action ; as when a document is meant to be sent to the plaintiff himself or to some person privileged to receive it, and it is sent in error someone else.

Q. What amounts in law the publiction of a defamatory statement ?

Ans. Ingredients of Defamatory statement—One of the requisite of defamation is publication. Publication is the communication of the wards to at least one other person than the person defamed. Communication to the plaintiff himself is not enough, for defamation is an injury to one's reputation, and repution is what other people think of a man, and not his own opinion of himself. The handing back by printer to the author a defamatory document printed in the ordinary course of business is not of itself publication by the printer so as to make him liable. The communication of a libel by the writer to his own wife is not publication because in the eyes of law husband and wife are one person. But the communication of the statement to the wife of the person defamed is publication. If the libel be contained in a telegram or be written on a postcard that would amount to publication.

Problem

Q. A woman is photographed without her knowledge and consent and the photograph is used for an advertisement. Discuss the liability of the photographer and the advertiser to the woman.

Ans. The photographer and the advertiser both will be liable for committing the tort of libel. It will injure the prestige and modesty of a woman if her photograph is taken and used for advertisement without her consent. Test is whether under the circumstances in which the writing was published, reasonable man, to whom the publication was made, be likely to understand it in a libellous sense. It does not signify what the motive of the person publishing the libel was or wheher he intended to have libellous meaning or not.

In *Youssonpoff* Vs. *M. G. M. Ltd.* (1934) the defendant production and exhibited a talking film calculated to defame a woman of good character and social position. This cinematograph was held as libel. "There is no doubt that so far as photographic part of the exhibition is concerned that is permanent matter to be seen by the eye and is the proper subject of an action for lible, if defamatory."

In the present case the woman can maintain an action for libel without proof of special damage. The photograph constitutes a libel in so far as it is instrumental in lowering down her dignity and social position in the estimation of others and she is likely to be shunned by the society.

It is also an established principle, that if a libel appears in the newspaper, the proprietor, the editor, the printer and the publisher are liabel to be sued either separately or together. The proprietor is liabla for any libel which appears in its column even though the publication is made in his absence without his knowledge or even contrary to his order.

The position of advertiser and the photographer in the present case is the same that of a printer, editor and publisher. Hence both the photographer and the advertiser will be held liable.

Q. Is there a publication in the following :—

(i) 'A' writes a letter to 'B' making a defamatory statement against 'B'. The letter is received by 'B' who destroys it after reading it.

(ii) 'A' writes a letter to 'B' making defamatory statement as against 'B'. The letter is opened and read by 'C'.

(iii) 'A' sends a telegram to 'B' containing defamatory statement against him. The telegram is received by 'B' who destroys it after reading it.

(iv) "C" is an applicant for an appointment in 'B's' business. In reply to an enquiry by 'B' as to 'C's' character, 'A' writes a letter which contains an untrue defamatory statement about 'C' in the belief that it is true. Having written the letter ; 'A' negligently puts it into a wrong envelope, so that it ultimately reaches 'D' who informs 'C' of its contents.

(v) 'A' maliciously tells his wife that 'B' another lady is an adulterer.

(vi) 'A' slandered 'B' in 'C's' hearing. 'C' repeated the slander to 'D'.

Ans. (i) In this case there is no publication. A communication to the person defamed himself is not a sufficient ground of publication.

(ii) In this case also it would not amount to publication. The letter was intended for *B* but it was opened by *C*. It was not the duty of *C* to open *B*'s letter.

(iii) There are certain cases where publication of the defamatory statement is presumed. In the case of telegram it is presumed that the statement is read and understood by the telegraph operator. In this case, therefere, publication may be presumed.

(iv) In the case there is publication. "A publication to the wrong person by mistake is a ground for action ; as when a document is meant to be sent to the plaintiff himself or to some person privileged to receive it, and it is sent in error to some one else." Here *A* is protected in the first instance because the occassion is a privileged one, but when *A* negligently puts the letter in a wrong envelop and it reaches a third person there is publication.

(v) In this case there is no publication. A communication between husband and wife is not a publication in the eyes of the law.

(vi) This is publication. If a person speaks or repeats slanderous words of another person there is an intentional publication.

Q. "It is essential for every action is defamation *that* the defamatory statement should be shown to refer to the plaintiff." Explain.

Ans. Defamatory statement Must Refer to Plaintiff—For successful action for defamation, it is necessary that the plaintiff must prove that the defamatory statement was understood by at least one person to refer to him. it is not sufficient that if only plaintiff pleads that the words complained of were referred to him. A person other than the plaintiff should say that he also thought that the defamatory statement was for the plaintiff. It is not necessary that the plaintiff's name is contained in the statement, it is sufficient if the statement, is such that at least one person to whom it was communicated had good and reasonable ground for believing it to refer to the plaintiff. In *Hulton* Vs. *Jones* (1910) A. G. 20, it was observed that it is not necessary that the defendant should have intended to refer to the plaintiff or even known his existence. "The question in each case is not where the defendant intended any such reference, but whether any person to whom statement was published might reasonably think that the plaintiff was the person referred to." Even if the defamatory words are true of some other person they may, at the same time in the eyes of law be defamatory of the plaintiff. A person may be defamed under a fictitious name or by mere description. The test in every case is whether the words are such as would reasonably lead persons acqainted with the plaintiff to believe that he was the person referred to.

Q. Explain and illustrate the term "*innuendo*".

Ans. *Innuendo* sometimes the defamatory statement is plain and addressed to plaintiff directly. Difficulty arises in bringing a case against the defendant for defamation. But when the defamatory statement is not plain and further explanation is needed to clear the doubt, it is called *innuendo*.

A statement *Prima facie* may be innocent but if the latent meaning or secondary defamatory meaning sufficienly proved it becomes actionable. The plaintiff who infers such defamation from the act of the defendant, will have to prove to the entire satisfaction of the court that reasonable persons are capable of understanding in the same sense in which the plaintiff has understood and further he will have to satisfy the jury that they were so understood by reasonable people.

When, however, the words are not defamatory in their natural and ordinary meaning, or where the plaintiff wishes to rely upon an additional defamatory meaning in which they were understood by persons having knowledge of particular facts, then an *innuendo* is required. Thus in a statement by the plaintiff of the meaning which he gives to the words, he must prove the existence of facts to support that meaning. If such facts do not exist the *innuendo*, fails.

In Talley Vs. *Fry and Sons Ltd.* (1931) A. C. 333, the plaintiff, a famous amateur, was caricatured by the defendant without his knowledge and consend, in an advertisement of their chocolate which depicted with a packet of it producing from his pocket in the company of Caddie who was holding up packets of the defendant's chocolate.

The Plaintiff sued the defendant for libel alleging by *innuendo* that the advertisement means that the plaintiff had ageed for reward to allow the advertisement and that thereby prostituted his reputation as an amateur golfer. Evidence was given that such conduct if it had really occurred would have injured his amateur status. The House of Lords held that the *innenudo* was correct.

For an action for defamation by *innuendo* the knowledge of the defendant is immaterial and he must bear the consequences. In *Cassday* Vs. *Daily Mirror Newspaper* (1929) 2 K. B. 331the defendant published a photograph with the following words underneath. "*Mr. M. Corrigan*, the race horse owner and Miss *X* whose engagement has been anounced". When Mr. Corrigan and Miss *X* posed for the photograph he expressly authorised the photographer to publish it with the announcement of his engagement. The defendant did not know that at the time plaintiff was, and was known among her acquaintances, the lawful wife of Mr. Corrigan.

The *innuendo* inferred by these words by the plaintiff was that she was an immoral woman who had cohabited with Corrigan without being married to him and some female acquaintances of the plaintiff gave evidence that they had formed a bad opinion of her on her on that ground as the result of the publication. The *inneundo* was considered right and the damages were awarded.

Q. State briefly the main tests which determine whether a statement is defamatory or not ?

Ans. Main tests of Defamatory statement—(i) It is for the court to say whether the words complained of are capable of bearing a defamatory meaning whether in fact they bear that menaing.

(ii) The words used must be construed in the sense in which they would be understood by ordinary person. If they are not capable of defamatory meaning in that sense they may nevertheless be actionable if it is proved that they would be understood as defamatory by the persons to whom they published.

(iii) In need not proved that the defendant meant to defame any person ; it is sufficient if reasonable persons who knew the plaintiff understood the defamatory statement to refer to him (*Hulton & Co.* Vs. *Jones* (1910 AC 20).

(iv) If a statement *exfacie* innocent is defamatory by reason of only extrinsic facts, the defamer's ignorance of such facts is irrelevant to his liability for publication (*Cassidy* Vs. *Daily Mirror Newspaper* (1929) K. B. 331.

Q. Can an action of libel or slander be brought by (a) a Corporation, (b) a class of persons (c) a tradesman for criticism of his goods (d) on behalf of a deceased person.

Ans. (a) Corporation—A company or corporation may sue for libel or slander. A corporation has a business reputation and when it is defamed in this respect the law will protect it as it does a private idividual. Thus a Corporation may maintain an action for defamatory words which discredit it and tend to cause lose to it in the conduct of its business. For example if a newspaper publishes an article that a company has issued bogus shares. The newspaper has defamed the company.

(b) Class of persons—The general rule is that where words are published of a class of person and there is nothing to show which one was meant, none can sue.

In *Knupper* Vs. *London Express Newspaper Ltd*. (19 4) A. C. 116 the house of Lords made law as follows (i) "Normally where the defamatory statement is directed to a class of persons no individual belonging to the class is entitled to say that the words were written or spoken of himself." If a man wrote that all lawyers were thieves, no particular lawyer can sue him unless there was something to point a particular individual.

(ii) Words which appear to apply to a class may be actionable if there is something in the world, or the circumstances in which they were published which indicate a particular plaintiff or plaintiffs.

(iii) If the defamatory statement is pointed towards a limited class or group so that the words can be said to refer to each member, all will be able to sue.

(c) Tradesman—If the words are such which are clearly used for the plaintiff's goods no action for slander or lible will lie. There are, however, cases in which criticism of goods may affect a businessman's reputation. Thus it would defamatory to say that *A* sells adulterated goods for such a statement imputes dishonesty and casts reflection on the man in the way of his trade.

(d) Deceased Person—Defamatory words published of a deceased person are not actionable at the suit of surviving relatives.

Q. What are the various defences to an action for defamation ?

Ans. Defences to action for Defamation—The following are the defences to an action or defamation :

(i) Justification
(ii) Fair Comment
(iii) Privilege.

(i) Justification—If the defendent proves that the statement made by him is true, he will not be liable for defamation. A man cannot recover damages if he alleges that his character has been attacked when he does not possess good character. If *A* makes a statement that *B* is a drunkard and proves that *B* is really such a person. *B* can not recover damages from *A*.

The defence, that is put by the defendence, if rests on the truth, is called the plea of justification. On the pleas of justification, it is not necessary that the defamatory statement should be literally true. It is sufficient if it is true in substance. And this is so even although the defamatory statement is made for no good purpose and is inspired by it will towards the person about whom it is published and is made solely for the purpose of harming him.

In *Wokley* Vs. *Cook and Healey* (1849) L. I. Ex. 91 a defence of justification to a statement that the plaintiff was a "libellous journalist" was held bad on proof that the plaintiff had libelled only one person who had obtained judgment against him.

Where there are several imputations, the defendant may justify only some, but it must be clearly proved that the statments can be separated. "The justification must be as broad as the charge and must justify the precise charge." In *Bishop* Vs. *Latimar* (*1861*) *4 L. T. 775* where it was published "How lawyer *B* treats his clients, and it gave only the account of one client. It was held that the justification is insufficient."

(2) Fair Comment—No action will lie for libel or slander if the defendent can prove that the words complained of are fair comment on matter of public interest or is submitted to public criticism. In the defence of fair comment the defendant does not deny his statement, but establishes defences by way of confession and avoidance. This is the defence in which the defamatory statement is admitted by the defendant but he pleads that no action should be taken against him as it is a fair comment. The responsibility is on the plaintiff to show that the words are reasonable of being understood as defamatory of him; once this responsibility has been discharged, it is for the defendant to establish that the matter is a fair comment.

A comment is an expression of opinion of facts. If comment is based on statments which are false, then the foundation of defence fails.

A comment is distinct from that of statement of fact. For example *X* says of a book published by *Y*, *Y*'s book is foolish, *Y* must be a weak man. *Y*'s book is indecent and *Y* must be a man of bad mind. These are comments and shall be a good defence for an action for defamation where *X* says "I an not surprised that *Y*'s book is foolish and indecent for he is a weak man and libertine." This is not a comment but a statement of fact that *X* cannot plead defence of fair comment but must prove his words to be true. In the same way if one person says that a particular person is not an honest man, this is not comment of fact. In this the defendant will have to give justification of his statement.

Accordingly where the facts alleged are defamatory and adverse comment is made, the defendant must prove first that the facts are true and second that comment is fair.

(3) **Privilege**—A person publishes a defamatory statement at his own risk and he is liable for damages if the statement so published proves to be false. But in certain cases the defendant pleads that the occasion was privileged and he should not be held liable. Privilege is the immunity conferred by law on statement made on certain occasions called "privileged occasions." The defametory statement is excusable when it is published on privileged occasion on which the liability for defamation ought to be excused because the interest of the public outweight the plaintiff's right to his reputation.

The privileged occasion may be (i) absolute privilege (ii) qualified privilege. An absolute privilege is that where the matter is of such permanent importance to the public that nothing can defeat it, however false and defamatory it might be.

Qualified privilege on the other hand is that occasion where the defendant is entitled to make the statement even if it be false, but only if he makes it honestly in the absence of malice. Lord Atkin defined it in *Adom* Vs. *Ward* (*1917*) *A. C. 309*. "A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The reciprocity is essential."

Q. What is Fair Comment ? Comparing it with justification bring out the similarities and differences between these two defences.

(L. U. 1978)

Ans—A man's reputation is his most treasured possession. It takes a long time to acquire good reputation and it is in minutes that the reputation so earned can be lost.

Law protects our life, property and reputation. Any body who attempts to cause injury to these or anybody who causes injury to these rights is liable for the injuries.

What amounts to an injury to our reputation. That which causes loss of our social respect, that which lowers us in the eyes of society is the cause attributed to injury to our reputation. But if there are certain exceptions which are not considered to be cause of injury to our reputation. These exceptions are (i) Fair Comment and (ii) Certain privileges *i. e.* immunity from liabiliting to certain to persons under certain given set of circumstances. The exception *i. e.* fair comment, with which we are persently concerned, is invoked to justify literary and political criticism. Nothing can be a libel which is a fair comment on a subject fairly open to public discussion, whoever occupies a public position renders himself open to public discussion. He must accept an attack, as a necessary, though unpleasant appendage to his office. Whoever submits his book or work of art to public approval cannot couplain if disapproval is expressed even in the strongest term. It is impossible to fix a standard of fair criticism of fair comment. "So long as the facts on which opinions are expressed are substantially correct and the openion itself is honest and free from malice, a very wide latitude in language is permitted."

In an era of democracy freedom of expression has been recognised as a basic and fundamental right of every person. Every body should be free to discuss the affairs and conduct of men in public life who fill offices and aspire for office." There was a time when scandalising them was a severely punishable offence. Libels were treated, both against officials and private persons as offences. The view that the law takes of the offence of public seditious libels will depend upon the view held as to relations of rulers to their subjects. The ruler may be regarded as superior to the subject or the ruler may be regarded as his agent and servant. It is this later principle which has gradually influenced the law of political and seditious libels. The principle is trying to assert itself in this country with the advent of our new democracy. One can Confidently say that in course of time this branch of law of libel will settle down to a reasonable adjustment of sober and yet effective political criticism.

Thus the justification for fair comment is obvious.

Libel, *i. e.* defamatory matter published by a person is a tort and renders the publisher liable in civil action. But if the matter published is true it is a complete defence. "The truth of defamatory words is complete defence to an action of libel or stander though it is not so in criminal act.

Fair comment is fair comment when it has following elements:—

(i) The comment must be of public interest.

(ii) The comment must be an expression of opinion and not assertion of fact.

(iii) Comment adhere to the text.

(iv) The comment must be fair.

(v) The comment must not be malicious.

(i) **The comment must be of public interest**—The term "public interest" includes all matters in respect of administration of justice, the affairs of Parliament, the conduct of government and public servant or the functions of local or general bodies.

Literary and artistic criticism may also form the subject matter of fair comment. It was observed in *Carr* Vs. *Hook* (*1808*) *1. Comp 355* "Every man who publishes a book commits himself to the judgement of the public and any one may comment upon his performance. If the commentator does not step aside from the work or introduces fiction for the purpose of condemnation, he exercises a fair and legitimate right."

(ii) The comment must be in expression of opinion and not assertain of fact—The comment in order to be fair must be based on facts. In *Dakhyl* Vs. *Labonchere (1908) 2 K.B. 325*, the plaintiff described himself as a "specialist for the treatment deafness, ear, nose, and throat, diseases." The defendant described him as a "quack of the rankest species." It was held that it might be comment.

The defamation Act 1952 provided that in an action for libel or slander in respect of words consisting partly of allegation of fact and partly of expression of opinion a defence of fair comment shall not fail by reason only that the truch of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

To say that "*A* is a disgrace to human nature", is an allegation of fact. But if the words were "*A* murdered his father and is, therefore, a disgrace to human nature", the latter words are plainly a comment upon the former.

(iii) The comment must adhere to the text—Not only there must be fitting text for the comment, but the comment must be confined to the text. One portion of a man's life may be public property but it is therefore lawful to comment on the whole.

In *Lyle Samuel Vodhams Ltd. (1920) I.K.B. 135* it was thought that the private life of a Member of Parliament may be material to his fitness to occupy his public office.

(iv) The comment must be fair—If the Judge find that the comment is within the limit of criticism the case need not go to Jury.

In *Mcquire* Vs. *Western Morning News Co. Ltd.* (1903) 2 K. B. 100, the plaintiff produced a play at Plymouth. The performance was criticised in the defendant's newspaper in terms which, the plaintiff conterned that it was dull, vulgar and degrading, that the actors were incompetent and that the plaintiff himself was incompetent both as an actor and composer. The plaintiff sued the defendant for libel. The defendant pleaded fair comment. It was held that the defendant was no liable.

Lord Porter in Turner Vs. *M. G.M. Pictures Ltd.* said "question is not whether the comment is justified in the eyes of Jury, but whether it is the honest expression of the commentator's real view and not more abuse or invective under the guise of criticism".

(v) The comment must not be malicious—Malice may negative the defence of fair comment. Malice here means evil nature. When the defendant publishes a statement and he pleads fair comment or privilege, the state of mind of the defendant is to be seen. It has to be seen as to with what motive such a statement was made.

If the defendant made statement with hidden motive to tarnish the name of plaintiff, he is liable. The comment should be without malice and expression just and fair opinion.

As far as justification for libel are concerned the following facts may be noted :—

(1) **Justification by truth**—The truth of defamatory words is a complete defence to an action of libel.

(2) **Fair and bonafide comment**—This has been treated earlier. A fair and bonafide comment on a matter of public interest is no libel. Therefore a bonafide comment is no tort.

(3) **Privilege**—This means that a person stands in such a relation to the facts of the case and he is justified is saying or writing what would be slanderous in any one else.

Q. What kind of statements are absolutely privileged so that no action will lie in respect of them however false defamatory and malicious they may be ?

Ans. Statements Absolutely privileged—Absolute privilege is pleaded on such an occosion when in the public interest it is not desirable to enquire whether the words or acts of certain persons are malicious or not. Absolute privilege protects the persons who are also discharging their duty. Where *A* while discharging his duty in the public interest says something defamatory of *B. A* can take the defence of absolute privilege.

In the words of Fry L. J. "It is not a desire to prevent action from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law, but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who are merely discharging their duty.

Absolute privilege includes :

(i) **Statement made in Parliament**—This has been settled by the Bill of Right 1888. In India, Constitution provides that no action shall be taken against a Member of Assembly or a Member of Parliament for what is said in House by the Member.

(ii) Reports, papers, votes and proceedings ordered to be published by either House of Parliament.

(iii) **Judicial Proceedings**—It is the established law that witness, Counsel, jury and Judge cannot be put to answer civilly criminally for words spoken in office. No action for slander or libel lies against a Judge, counsel or witness for the words spoken or the statement made during the course of a proceeding in the court of law.

This privilege has been given to all tribunals, exercising functions equivalent to those of an established Court of Justice and applies wherever there is an authorised enquiry. Such enquiry may not be before a Court of Justice but before a tribunal with the same qualities. This privilege does not extend to officials possessing merely administrative functions.

This privilege has also been given to advocates. An advocate cannot be held liable for what he has said during the proceeding of a case in the court "*A* counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false.

Similar immunity has been given to a witness. The reason is that witness is supposed to give evidence without any fear. If there is any fear that he may be taken to task for what he has said no witness would like to appear in the court however true a case may be.

(iv) Communication between a solicitor and client—In *More* Vs. *Weaver* (1928) 2 K. B. 520, the Court of Appeal laid down that communication between solicitor and client with reference to matters upon which the client is seeking professional advice are absolutely privileged.

It has also been laid down that communications between solicitor and client will only be called absolutely privileged if the conversation is such as is fairly referable to the relationship of solicitor and client. The mere fact that *A* who speaks or writes is a solicitor and *B* to whom he speaks or writes is his client affords no protection. The communication defamatory of a person should relate the case which has created the relation between an advocate and client. If there is some communication between an advocate and his client which has nothing to do with the case they are dealing, the defendant can not plead the defence of absolute privilege.

(v) Communication made by one officer of State to another in the course of his official duty—The Court of Appeal decided it in *Chatterton* Vs. *Secretary* of State for India (1825) 2 Q. B. 189, the defendant in the course of his duty, wrote to the Under Secretary of State that the Commander-in-Chief in India and the Government of India recommended the removal of the plaintiff to the half pay list as an officer, and the letter stated the reason for the recommendation. It was observed that it is not competent to a civil court to entertain a suit in respect of an action of an official of a State in making such a communication to another official in the course of his official duty, or to enquire whether or not he acted maliciously in making it."

The communication in commercial matters shall also be protected by absolute privilege.

In *Dawkins* Vs. *Lord Paulat* (1869) L. R. 5 Q. B. It has been held that no action would be taken against a military officer for a report made by him in the ordinary course of his duty even if it were made maliciously and without reasonable and probable cause.

(vi) **Fair and accurate newspaper and broadcast reports of Judicial proceedings**--This is doubtful whether these reports are absolute or qualified due to the interpretation of saction 3 of Libel Amendment Act 1888 which was amended by Section 8 of Defamation Act of 1952 provides that "A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, it published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorise the publication of any blasphemous or indent matter."

Problem

Q. Discuss whether in the following cases 'B' has a cause of action against 'A' and if he has whether 'A' can take up any of the special defences available for this kind of action.

(a) 'B' writes a Book and in the review of it 'A' writes : "B" has asserted that one plus one makes three' and comments that 'B' is an idiotic person ;

(b) 'A' published in newspaper that 'X', a husband of 'B', a Hindu woman is going to marry.

(c) 'A', commenting on the evidence given by 'B' in a criminal case states that no one need be surprised by the evidence as 'B' is well known for his double dealing ;

(d) 'A' giving on evidence before executive committee of educational institution, states that out of twelve persons appointed by 'B' the manager of the institution, nine are his relations.

Ans. (a) *B* can bring an action against *A* for defamation. But *A* can take up the defence of fair comment. It is the established law that no action will lie for defamation if the defendant can prove that the words complained of are fair comment on a matter of public interest or it submitted to public interest. The comment in order to be fair must be based on facts.

In the above case one plus never make three. It is a fact and commenting on that fact *A* called *B* an idiot, which amount to expression of opinion and not assertion of fact. The latter view is the comment on the former. The comment of *A* may be taken as fair comment and he can take defence of it.

Lord Ellenborough said in *Carr* Vs. *Hood* (1808) I Camp 355, "every man who publishes a book commits himself to the judgment of the public and any one may comment upon his performance". In this case *A* commenting upon the book written by *B* does not go beyond the subject-matter and thus he can put the defence of fair comment.

(b) *B* can bring an action for libel. But *A* can put the defence of justification. The defendant shall not be liable in defamation if he proves that defamatory statement is true. *A* can prove that *X* is really going to marry *Y* and if truth is proved he is not liable.

(c) *B* can bring an action for defamation against *A*. *A* witness enjoys absolute privilege in judicial proceeding before a court of law. A witness cannot be sued for what he has stated in connection with the case for which he has come to the court. His statement cannot be a subject-matter of public criticism and comment. This immunity has been provided to witness so that he can give evidence without fear. A cannot take the defence of fair comment.

(d) In this case *B* has a cause of action against *A*. A can put up the defence of absolute privilege. The immunity of absolute privilege extends to all tribunal exercising functions, equivalent to those of an established court of Justice. This privilege does not extend to official possessing merely administrative functions.

The executive committee of an institution is not a court nor a tribunal and any false statement may be liable for an action in defamation.

Q. 'A', a client writes to his advocate 'B' that 'B' should be aware of 'C' who is a cheat and dishonest person. Can 'A' plead absolute privilege, saying that communication between solicitor and client is absolute privilege.

(b) 'A', an officer records in the character roll of his subordinate officer "Integrity doubtful." Can 'A', be held liable for defamation ?

(c) 'A', an officer is reverted from his post by 'B'. 'A' is posted in other district and 'B' through a letter informs 'C', another officer the cause of his reversion. Can 'A' bring an action against 'B' for defamation ?

Ans. (a) *C* can bring action for defamation and recover damages from *A*. It is true that communication between a client and advocate is protected by the defence of absolute privilege. But the occasion is privileged when there is communication between advocate and client with reference to matters upon which the client is seeking professional advice. The mere fact that the person speaking is a solicitor and the person to whom he speaks is his client affords no protection.

The statement defamatory of *C* has nothing to do with the relation between *A* and *B*, hence *C* can claim damages.

(b) *A* cannot be held liable for defamation. Official record and communication enjoy the protection of absolute privilege.

(c) *A* cannot successfully bring an abtion against *B*. In *Chatterton* V. *Secretary of State for India* (1895) 2 Q. B. 189 it was observed, "It is not competent to a civil court to entertain a suit in respect of an action of an official of a State in making such communication to another official in the course of his official duty.

Q. The Judge told 'X', the plaintiff, in the court while trying a case that he was "a harpy, preying on the vital of poor". 'X' sues the Judge for slander alleging that the words complained of had been spoken "without any foundation whatever "and that they were wholly" uncalled for. Decide.

Ans. *X*'s suit is not maintainable. It is an established law that no action will lie against a Judge for any act done or words spoken in his judicial capacity in a Court of Justice.

"It is essential in all courts that the Judge who are appointed to administer the law should be permitted to administer it under the protection of law independently and freely, without favour and without fear. The protection of law is not for the protection or benefit of the malicious and corrupt Judges, but for the benefit of the public, whose interest is that the Judges should be at liberty of exercise their function with independence and without fear to consequences. How could a Judge so exercise his office if he were in daily ond hourly fear of an action being brought against him and of having the question submitted to Jury whether a matter on which he has commented judicially was, or was not relevant to the case before him it is impossible to over estimate the inconvenience of such result."

Q. On the trial of one 'A' for administering drugs to persons in the plaintiff's house, for the purpose of enabling a burglary to be committed there whilst the inmates were in a stupefied condition. 'A's' advocate in the course of his address for the defence, suggested that the plaintiff kept drugs in the house for immoral purposes. The plaintiff sues the advocate for slander. The advocate puts up the defence of absolute privilege. Is the defence good ?

Ans. The statement of the advocate was absolutely privileged. The rule is that even if the words complained of are uttered by the advocate in the course of the Judicial enquiry maliciously, that is to say, not with the object of doing something useful towards the defence of his client or that the words are uttered without any justification or even excuse and from the indirect motive of personal illwill or anger towards the prosecutor, no action will lie against the advocate." If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witness, although they speak maliciously and without reasonable and probable cause, is not for the benefit of the administration of the law that the counsel also should have an entirely free mind ? Of the three classes, Judge, witness and counsel, it seems to me that the Counsel has a special need to have his mind clear from all anxiety for, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public……" Per Brett. M. R. in *Ministor* Vs. *Lamb.*

Q. (a) 'X' while giving evidence in a dispute as to the genuineness of a signature to a will witessed by 'A' said "I believe the signature to the will to be a rank forgery, and I shall believe it to the day of my death". 'A' sues 'X' for defamation alleging the meaning that 'A' had been guilty of forgery or of abetting it. Decide.

(b) 'A' was giving evidence in a case. While 'A' was in the witness box 'B', another person, entered the court. Seeing 'B', 'A' at once says that he is the man who picked his pocket the other day. 'B' sues 'A' for defamation. Decide.

Ans. (a) In this case the words complained of were absolutely privileged and no action can lie against *X*. The rule is that a witness is privileged to the extent of what he says in course of his examination. The privilege is affected neither by relevency nor irrelevancy of what he says. In case he is made to consider what is relevant and what irrelevant he is made to think over that question. The witness is asked to answer typical questions. A witness does not enjoy privilege for what he says before entering the court or after leaving the court.

The witness's protection is based on the necessity of giving evidence fearlessly. A witness cannot give evidence if he is afraid of any action being taken against him for the statement.

(b) *A* shall be liable in defamation. The law provides the protection of absolute privilege in judicial proceeding. The law is that a witness cannot be held liable for what he says in answer to question asked by the lawyer in connection with case in which he is giving evidence.

A witness will not be protected if he says anything that has nothing to do with the case. It has been said in *Seaman* Vs. *Netherelist by Bramwell L. I.* "while a witness was in the box a man were to come in at the door and the witness were to exclaim that man picked my pocket" I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness box wantonly and without reference to the enquiry."

Q. Distinguish between absolute privilege and fair comment as a defence in action for defamation.

Ans—Distinction Between Absolute Privilege and fair comment as Defence for Defamation–(i) The fair comment is pleaded as defence when made on the matter of public interest, whereas the doctrine of absolute privilege is that in the public interest it is not desirable to inquire whether the words or acts of a person are malicious or not.

(ii) Fair comment can be made by any person on the matter which has been brought for public criticism. For example *A* publishes a book. This means he has brought it out general opinion and anyone may comment on it. Absolute privilege protects only certain person or a body of persons. It can be pleaded as defence in support of statement made on certain occasion, for example a witness or an advocate arguing a case.

(iii) Fair comment is an expression of opinion when absolute privilege is a defence in action for defamation even though the statement may be false. *A*'s comment on some artistic works is an expression of opinion. What a lawyer says during the argument may be false but absolute privilege protects him.

Q. Discuss the plea of qualified privilege that can be set up in an action for defamation and examine the circumstances under which the defence will be lost.

Ans—Plea of Qualified Privilege—"A statement is said to possess a qualified privilege when although false and defamatory it is not actionable without proof of malice."

There are three elements in the qualified privilege namely the occasion must be fit ; the matter must have reference to the occasion and lastly it must be published with right and honest motives.

There is always some reason which makes an occasion privileged. When *A* says that he made statement on a privileged occasion, this means he says that there was certain reasons due to which the occasion was privileged. The defendant is entitled to the protection of privilege if he uses the occasion for that reason. The defendant is not entitled to the protection if he uses the occasion for some indirect and wrong motive.

The law presumes or implies malice in all cases of defamation ; this presumption may be rebutted by showing that the words were uttered on a privileged occasion. A privileged occasion is an occasion where the person who makes a communication has an interest or a duty legal, social or moral to take it to the person to whom it is made and this person to whom it is made has a corresponding interest or duty to receive it. The reciprocity is essential. (*Aam* Vs. *Ward*).

In *White* Vs. *J and F Stone Lighting and Radio Ltd*. (1939) it was observed that "where the statement is made to the plaintiff in the presence of a third person, the occasion is not privileged unless the third person has such an interest or duty".

Thus the qualified privilege is an intermediate case between the total absence of the privilege and the prssence of absolute privilege. In this case the person making false and defamatory statement is neither absolutely free from liability nor is he absolutely liable. The defendant has to prove that the occasion is privileged. If the defendant proves, the burden of showing actual malice, or malice in fact, is cast upon the plaintiff, but unless the defendant does so, the plaintiff is not called upon to prove actual malice. To prove malice. extrinsic evidence of malice is not necessary, the words of libel and the circumstances attending its publication may themselves afford evidence of malice.

Qualified privilege includes :

(i) Fair and acccurate reports of parliamentary proceeding. In *Wason* Vs. *Walter*, L. 4 Q. B. 73, the advantage to the community from publicity being given to the proceedings is so great that the occasional inconvenience to individuals arising from it must yield to the general good.

(ii) Fair and accurate reports of judicial proceeding which the public may attend. As these are published solely to afford information to the public, and for the benefit of the society, they are privileged.

(iii) Fair and accurate newspaper reports of the proceeding of any public meeting.

(iv) Statement made under a moral or legal duty. Here one person must be under a duty to communicate to another person and the recipient must have a corresponding interest in receiving the communication. For example, a former employer of a servant has a qualified privilege to make a defamatory communication about the character or conduct of the servant to a present or prospective employer.

The following cases will illustrate the point :

In *Wintamley* Vs. *Bumption* (1943 K.B.) 319 a letter was written by the creditor of Junior officer to his commanding officer to secure payment of a debt. The occasion was held to be privileged.

In *Boxus* Vs. *Gollal*, a solicitor under the instructions from his client dictated to his Typist a letter addressed to *B*, containing defamatory statement about *B*. The letter was press copied by another clerk. The question arose whether *B* could sue the solicitor for defamation.

It was held that the privilege of protection of a business communication covers "all incidents of its transmission and treatment which are in accordance with the reasonable and usual course of business." Thus the publication to his clerk by the solicitor is covered by a qualified privilege and therefore *B* cannot sue the solicitor for defamation.

(v) Statement made by one partner to another where they have common interest. For example, communication made by an insurance company to its policy holders about an agent of the company.

(vi) Statement made in protection of one's self or of one's property. For example, *A* askes his servant not to associate with *C* whom he had dismissed for steeling.

(vii) Statment made to the authorities for redress of public grievances. For example, a complaint to the District Magistrate that a Lekhpal takes bribe.

Q. Distinguish between absolute privilege and qualified privilege.

Ans Distinguish between Absolute and Qualified Privilege— (i) Absolute privilege is based on the principle of the freedom of speech and expression, whereas in the qualified privilege, the fitness of the occasion and the relevancy of the matter with the occasion is to be considered.

(ii) In the case of absolute privilege it is occasion which is privileged ; and when once the nature of the occasion is shown, it follows as a necessary consequence that every communication on that occasion is absolutely privileged, while in qualified privilege the defendant does not prove privilege until he has shown how the occasion was used.

(iii) In the case of qualified privilege if the plaintiff proves that the pea is colourable and it is done under the pretence of the duty with some indict, the defence fails, but this is not so in the case of absolute privilege.

Q. Consider the following cases and say whether the plea of fair comment is available in any of the case.

(i) **'B' writes series of articles in a newspaper appealing to the public to contribute for temperance work. 'X' prints a criticism denouncing the appeal as a hoax and says that the real purpose was to put money into "B's" pocket.**

(ii) **'A', dramatin critic in reviewing a play refer to it as "dull and stupid" and to the action as "absurd and ridiculous" 'B' another critic, opines that the play is "a meritorious" piece of dramatic literature and has been completely produced and acted".**

Ans. (i) In this case *B* can bring an action for defamation against *X* and *X*, can not take the plea of fair comment.

In *Compbell* Vs. *Sopttiswood*, 32 L.I.O.B. 185, Cockburn C. J. said "......a line must be drawn between hostile criticism on a man's public conduct and the motive by which that conduct may be supposed to be influenced and that you have no right to impute to a man in his conduct as a citizen......base, sordid and dishonest and wicked motive. unless there is so much ground for the imputation itself. "Accordingly if the imputations are made which charge a public man with base and sordid motive or dishonesty, the defence of fair comment will not avail unless it is based on facts which warrant the imputation made.

(ii) In this case the plea of fair comment can be successfully set up. Criticism of the work or product of an artist is privileged if it expresses the actual opinion of the critic even though it is so fantastic that no reasonable man would agree to it.

Q. 'B' was an engineer. He with other trainees underwent a course of instructions at the premises of the F. Motor Co. Ltd. 'S' an employee of F. Motor & Co. was in charge of the course, and acted as an invigilator at the examination at the end of the course. During the examination 'B' with permission left the room, and when returned made certain alternations to his paper. After 'B' finally left the room 'S' on reading the 'B's paper announced to the remainder of the examinees''. This follows 'B' has cribbed and will get no marks in consequences." Decide.

Ans. In this case *S* can not be held liable for defamation. He can plead qualified privilege The rule is that communication between parties who have common interest are privileged. When statement is made on reasonable occasion and is in common interest, the statement can defend himself on the plea of common interest. *S* was the invigilator and instructor. He had a common interest with the examinees.

In *Bridgman* Vs. *Stockdale and another* (1953) I.All. E.R. 1166, in an action brought by the plaintiff for slander, it was held that defendant had acted in good faith and as instructor, examiner and invigilator, he had a common interest with the examinees to ensure, the fair conduct of the examination, and by virtue of that common interest, he had the moral duty or right to inform the examinees if he thought one examinee was taking an unfair advantage ; and therefore, the occasion was privileged, and there being no evidence of malice ; the communication was privileged and the action fails.

Q. The word publication has been used many times in the law relating to defamation. What does it mean ? Give illustrations.

Ans. The word publication in ordinary parlance mean "the act of making public. When used in the context of the law of defamation, it means making the defamatory known to come person other than the person defamed and unless this is done no civil action for defamation would lie. It is not enough that the defamatory matter may come to the knowledge of the plaintiff because defamation is a civil injury to the reputation which consists in lowering down a person in the estimation of the society in which lives and moves about. Communication to the plaintiff himself is not enough because defamation in injury to the reputation and reputation consists in the estimation in which others hold him and not a mans own opinoin of himself. Thus where a letter containing defamatory matter in respect of *X* is dictated to *Y* it will amount to publication unless the occasion happens to be a privileged one. But if *A* sends defamatory matter in respect of *B* to *B* only and nobody else knows it, there is no publication in the eyes of law provided *B* alone come to know the defamatory matter. Even if a third person comes to know the defamatory matter wrongfully, which was actually meant for the plaintiff, the defendant will not be liable. When the defamatory matter, say a letter, is sent to the plaintiff and is likely to be read by someone else there is publication of the defamatory matter. When defamatory matter is sent by post card letter, the contents of the letter are open and can be read by any one who cases to read it. In such a case publication of defamatory matter is presumed. Similarly when a defamatory matter is sent by post the defendant is held liable because a telegram is read by post office staff who transmit and receive the message. But if the defamatory matter contained in the post card or telegram is in code language which cannot be read and understood in transit, the publication will not be presumed and the defendant will not be liable for defamation.

In those cases where letter containing defamatory matter is addressed to the plaintiff is, in the ordinary course of business likely to be opened and read by his clerk or by his supouse or personal assistant there is defamation when the clerk or the spouse opens and reads that letter.

Q. Distinguish between libel and slander.

Ans. The word libel means defamation by means of writing, print or some permanent form. The slander on the other hand means defamation by means of spoken words or gesture. It is a tort and not a crime and is not actionable without proof of special damage, except in four cases when the words are said to be actionable *per se* i. e. (1) Imputing a crime punishable with imprisonment. (2) Imputing contagious veneral disease, (3) Disparaging a person in his office, profession calling trade or business, whether or not the words are spoken of him in the way of his office etc. (4) Imputing unchastity to a woman.

Libel and slander distinguished. Libel and slander differ from each other in the following respects:—

Libel	Slander
1. Libel is written or recorded in a permanent form.	1. Slander is spoken defamation.
2. Libel is defamation in a permanent form whether exhibited to the eye as in the case of a statue, effigy, caricature or the like, a gramophone record, or a film.	2. Slander is defamation in a transient form. It may be in spoken words or visible as in gestures.
3. Libel is bath a civil wrong and a criminal offence.	3. Slander is a civil wrong. Spoken words may however, fall within the criminal, if they are blasphemous, seditious or obscene, or if they amount to a solicitation to commit a crime or contempt of court. But there is no crime in slander. In India, slander is both a tortanda crime.
4. Libel is actionable *per se*.	4. Slander is not actionable *per se* (except as discussed in the answer in the beginning.
5. Libel shows greater deliberation and rouses a suggestion of malice.	5. Slander may be u'tend in the heat of the moment and often under sudden provocation.
6. The publisher of a libel may be an innocent person and therefore not liable.	6. In the case of republication of a slander, the publisher acts consciously and voluntarily and must necessary be guilty.
7. The period of limition is larger.	7. The period of limitation is shorter.

Q. 'A' makes a complaint to the Inspector General of Police that 'Y', a Station Officer has been asking for bribe from the public and has been inciting people to harm 'A'. 'Y' brings a case for libel against 'A'. Decide.

Ans. *A* cannot be held liable. The rule is that the statement made to the preper authorities in order to procure the redress of public grievances is not libel and shall be not actionable. *A* car plead qualified privilege.

In this case *A* made complaint for the redress of public grievancess and, as such, he is not liable for libel.

In *Harrison* Vs. *Bush* (*1855*) *E & B. 344* it was held that a complaint to the Home Secretary, of local Magistrate who has incited people to break peace would not amount to libie. If qualified priviledge.

CHAPTER XVI

TRESPASS TO LAND

Q. Define "trespass to land". What must be proved by plaintiff who sues for trespass to land ?

Ans. Trespass to land is entry on another's land without lawful authority. The person who commits a trespass is called trespasser.

The trespass is an interference with possesion. Trespass to land consist in the following unlawful acts :

1. Entering upon the land of plaintiff,
2. remaining on that land,
3. placing or throwing any material object upon it.

"Every unwarrantable entry on another's soil the law entitles a trespass by breaking his...... For every man's land is in the eye of the law enclosed and set apart from his neighbours; and that either by visible and material fence, as one field is divided from another by a hedge ; or by an ideal invisible boundry existing only in the contemplation of low, as when one man's land adjoins to another's in the same field."

"If the the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it."

Notice is unnecessary for an action for trespass of land. It is never a crime unless otherwise it is specially so made by some statute and it is actionable *per se* without proof of actual damage.

Where *A* removes soil from the land *B* belonging to *X* it would amount to trespass. The placing of rubbish against wall is also trespass.

In an action for trespass the plantiff should prove that he was in possession of immovable property, (i) that the defendant disturbed his possession. He needs not prove that ne is the owner or even that his possesrion is lawful, for possession is good against all the world except the true owner. Possession does not involve the physical presence of the possessor.

Problems

Q. (i) 'A', a landlord removes door and windows of a house in the possession of a tenant.

(ii) 'A' against 'B's' will forcibly carries 'B' upon the land of 'C'.

(iii) 'A' throws a pale of water against a wall of 'B's' house.

(iv) 'A' erects a house on his own land. The eaves of the roof overhang 'B' s' land.

(v) 'A' while hunting birds, fires bullets across 'B's' land close to the surface.

(vi) 'A' plies longs on his land. An unprecedented rainfall carries away the logs and deposits them on 'B's' land.

(vii) 'A' flies on a baloon. The baloon comes down on the premises of 'B', damaging 'B's, tinshed. A number of persons enter 'B's' land to witness the scene.

Ans. (i) In this case *A* is trespasser as removing of door and windows of the house in the possession of tenant is trespass.

(ii) In this case *A* is trespasser. *B* cannot be held liable for trespass as he entered *C*' s land not because of his own will.

(iii) *A* is a trespasser. In a trespass it is not necessary that the wrong doer must enter the land himself. He may without entering the land, invade another's interest by throwing or placing a thing either on or beneath the land or through the air space above it. Thus it is a trespass to throw rubbish on another's land even through he himself uses it as a dump heap.

(iv) *A* is a trespasser. The rule is that one owns a portion of the earth's surface, one also owns anything below or above that portion. In this case what is invaded is the area of ordinary user and that the injury is direct and immediate.

(v) *A* is a trespasser. There has been intrusion in this case over the area of ordinary user and, therefore, it is trespass.

(vi) *A* is not trespasser and is not liable to *B*. There is no liability for accidental intrusions.

(vii) *A* is liable for the harm caused by the baloon and by the person who entered upon the land. There is a liability for intrusions resulting from negligent conduct and harzardous activities.

Q. 'A', a land and lord owned certain land over which he has shooting right. This land is intersected by highways, the soil of which is vested in 'A' as owner on land on each side adjoining the highway. 'B' who has some grievance against 'A' used the highway in order to frighten birds as they came over the butts and to spoil the sport of shooting party. He was asked to desist, he refused to no so and was held down on the ground by the 'A' s' keepers until the drive was over. 'B' sued 'A' for assault. Advise 'A'.

Ans. *A* can successful take up the defence of trespass. *B* is a trespasser as he entered the land of *A* in order to frighten the brids. It is no tort to prevent a person from committing trespass.

The rule is if a man's land abutts on the highway he is presumed to own the soil over which the highway goes and he can maintain an action of trespass against anyone who injures him by using the highway in an unjustified way.

Similar were the facts in ***Harrison*** Vs. *The Duke of Rutland and others* (*1893*) 62 L. I. Q. B. 117, Harrison used to frighten the birds. He was asked to desist, refused to do so and was then held down on the ground by Duke's keeper until the drive was over. Harrison sued the Duke for assault. The Duke pleaded justification on the ground that the plaintiff was trespasser. The Court of Appeal held that he was a trespasser. The plaintiff walked up and down the thighway using it is a place from which he was to do certain things for the purpose of interfering with the shooting and he was therefore a trespasser.

Lopes L. J. said "The interest of public in highway consists solely in the right of passage."

Q. 'A', a landlord cuts electricity and water pipe of house in which 'B' a tenant has been residing in order to compel him to vacate the house. 'B' brings an action for trespass. Decide.

Ans. In this Case *A* committed no separate tort. In trespass, there must be unlawful entry on the land. It cannot be said that *A* did it in order to evict *B*. *A* cannot be held liable for trespass.

In *Perera* Vs. *Vandiyar* (1952) I All. E. R. 1109 it was decided that there is no trespass if a house owner cuts of the supply of gas and electricity and the tenant was compelled to leave the house.

Q. What is continuing trespass ? Illustrate giving leading case that you know.

Ans. Continuing trespass—When one enters on the land belonging to some other person without any justification and he remains there the wrong continues so long as that person remains on the land and does not withdraw from the place. Similarly when one places a thing on another person's land, such a trespass continues until it has been abated by the removal of a thing. Successive action will lie from day to day until the thing is removed.

Every continuance of trespass is a fresh trespass, in respet of which a new cause of action arises day to day as long as trespass continues.

In *Hudson* Vs. *Nicholson,* (1839) 5 M. & W. 437 the defendant wrongfully placed certain timber on the adjoining land in order to support his house. This land having been subsequently purchased by the plaintiff, he was entitled to sue in trespass for the continuance of the timber on his property.

In *Kauskier Goodman Ltd.* (1928) I. K. B. 421, where a builder who in demolishing building left rubbish on the roof of an adjoining, building, as a result of which a guilty became choked and the adjoining building was flooded, he was held liable to the tenant of that building although the tenancy had only commenced after the building operation had finished.

Q. What are various defenecs to trespass ?

Asn. Defences to trespass—The following are the defences to trespass:—

(i) Consent.
(ii) Justification by law

(i) **Consent**—Consent is a complete defence to an action for trespass. A consent to enter on land is known as licence. Pollock defines licence as "that consent, which without pursuing any interest in the property to which it relates merely pervents the acts for which the consent is given from being wrongful." *A* licence is an agreement that it shall be lawful for the licensce to enter upon the land of the licensor. If the possession of the land is exclusive, he is not a tenant but only a licensce.

It is a licence when *A*, a landlord tells a tenant that he could live in his house rent free for the rest of days. When a landlord, on the death of a widow of a statutory tenant, allowed her daughter to remain in possession paying rent for six months.

Where the owner of the shop allowed the manager to live in a flat above the shop but did not require him to do so and the value of flat was taken into account of Pound one a week in fixing his wages, he was held to be licensce and not a tenant.

It is a defence in a action for trespass to show that the defendant is on the land with the leave and licence of the owner. The licensce is a trespasser when he exceeds the authority. He is trespasser if he remains on the land when the licence is expired or is properly revoked.

A licence is revocable at pleasure except in the following three cases.

(i) A lincence coupled with interest in the land *e. g.*, to cut timbers.

(ii) Where the licence, acting upon the licence, has executed a work of permament character.

(iii) Where the licensor has agreed for consideration to allow the licensce to remain on his land for a particular period. In *Hurst* Vs. *Pictures Ltd. L. R.* (1942) I. K. B. 1 the plaintiff bought a ticket for an unreserved seat but was forcible turened out of his seat by the direction of the defendant's manager who by mistake thought that he had not paid for his rent. He sued the defendant for assault and recovered damages. Buckley, C. I said, "The plaintiff in the present action paid his money to enjoy the right of a particular spectacle. He was anxious to go into a picture theatre to see a series of views or picture during. I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle to attend a performance from beginning to its end. That which is called the licence, the righ to go upon the premises, was only granted him for the purpose of enabling him to have that which had been granted to him namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him namely the right to hear the opera.........The licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in it a contract not to revoke the licence until the speetacle had run to its termination.

In *Winter Gardens Theatres (London) Ltd.* Vs. *Millennium Productions Ltd.* (19-8) A. C. 173, theatre owners gave theatrical producers a licence to use the theatre on payment, for six months with an option to continue for a further period of six months. There was no provision for the termination of licence by theatre owners. The option was exercised for period extending over some two years when the theatre owners terminated the licence by a month's notice. It was held they were entitled to do so.

In *Thompson* Vs. *Park* (1944) K. B. 408, the plaintiff was a school master and the owner of a school, during the war, he allowed the defendant, also school master to use the school with his pupil. After a time he gave the defendant a notice to vacate the school and on refusal he removed his furniture and equipment. The defendant therefore, entered the premises by taking off the doors and plaintiff applied for the injunction which was granted and the defendant was held trespasser and his licence was revoked.

(ii) **Justification by Law**—The other defence in trespass to land is justification by law' *e. g.*, the law authorises some officials to enter on land, take goods, arrest persons as in the case of policeman who can enter a public house through an open door late at night in order to investigate a disturbance.

Where a right to enter land is conferred by law, a person entering in exercise of that right has a complete defence to an action of a trepass. Examples of such rights are.

(a) **Relating to goods**—If *A* places on his own land *B*'s goods, *B* may enter and retake it, or if a third person places *B*'s goods on *A*'s land *B* my enter take it.

(b) **Execution of legal Process**—Persons who execute a warrant of arrest or attachment or search can enter on the land of another to execute such warrent or attachment.

(iii) **Prevention of Crime** - A Police Officer may enter premises in order to prevent a breach of the peace.

Q. Write short notes on :

(i) Trespass ab initio.

(ii) Distress damage feasant.

Ans. (i) Trespass ab inittio—*Ab initio* is a Latin word which means from the beginning. Trespass *ab initio* means trespass from the beginning. Where a person enters on land in exercise of some right conferred by law and abuses the authority conferred by some positive act of wrong doing, the abuse relates back and renders the original entry unlawful. This makes the person so entering a trespasser *ab initio*.

In Six Carpenters Case (1610) the defendants, six Carpenters, entered the plaintiff's tavern and ordered a quest of a wine and penny worth of bread ; they drank the wine and are the bread but refused to pay the cost. The innkeepers sued the defendant for trespass and the only point in the case was whether the non-payment made the entry into this taven tortious. It was held they were not liable as trespasser *ab initio* ; their right of entry not having been abused by any act as distinct from mere omission. If, on the other hand they had stolen anything in the inn they would have been regarded as trespasser *ab initio* ; "because the law presumes from the subsequent act that the original entry itself was with an unlawful *inter se*".

Where *A* stays in a hotel and he steals some valuables from the hotel, the act of stealing is not authorised by law and this act of *A* would make him trespasser *ab initio.* But where *A* gives an authority, or licence himself to do anything, *A* cannot for any subsequent cause, punish that which is done by his own authority or licence.

In *Elias* Vs. *Pasmore*, (1934) 2 K.B. 164 police constable entered land to arrest one of the plaintiffs and while on the premises took possession of large number of documents some of which were seized outside the scope of entrant's authority. It was held that they were not trespasses *ab initio* as the entry on land was lawful and only liable for taking documents wrongfully.

(ii) Distress damage feasant—It is lawful for a man to seize property or animal belonging to another person on his land unlawfully doing damage in order to compel the owner of the offending chattel to make compensation for damage done. This right is known as distress damage feasant.

The right of distress damage feasant can only be excercised by a person who has sufficient possession of land to entitle him to maintain an action for trespass. But where there is no right of distress.

In *Sorrel* Vs. *Paged*, (1950) I. K. B. 252, it was held that if cattle, while they are being driven on tne highway, stray on to adjoining land without negligence on the part of the driver, they cannot be detained until a reasonable opportunity has been given to the driver to get them off again, for until they have committed no trespass. In order to justify distress there must not only be trespass but also actual damage as where cattle enter the field and graze grass or destroy crop.

Q. What are the remedies for trespass ?

Ans. Remedies For Trespass—The following are the remedies for trespass :—

(i) Re-entry—The person entitled to possession can re-enter the land. In *Hemmings* Vs. *Stake Pages Gold Club* (1920) I. K. B. 720, the plaintiff tenant of a cottage owned by defedants refused to quite it. The defendant entered upon the land after due notice and remove the plaintiff with no more force than was necessary. He sued the defendant for assault and battery and trespass and they were held not liable.

(ii) Ejectment—In an action of ejectment, the plaintiff is out of possession and he claims immediate possession of land. If the plaintiff shows that he was in possession of land before defendant it is sufficient to establish his title and the presumption is that he was dispossessed. This presumption cannot be rebutted merely by showing that the plaintiff did not derive his possession from any person who had title.

(iii) *Mesne* **profits**—In an action for the recovery of possession of land the plaintiff may join a claim for *mesne* profit. It lies to recoup the plaintiff for damages which he has suffered through having been dispossessed of the land. Under the head of *mesne* profits are included compensation for the value of the use and occupation of the premises, whether occupied by the defendant himself or by a tenant holding under him and also any damage which has been caused to the premises themselves, for the term *mesne* profits is not confined to the profits which have accrued to the defendant but extends to all loss that the plaintiff had sustained. *Mesne* profit can be claimed upto the tune when possession is restored.

CHAPTER XVII

TRESPASS TO GOODS

Q. What is trespass to goods ? What the plaintiff must prove in trespass to goods ?

Ans. Trespass to goods is a wrongful interference with the possession of them.

In trespass to goods the plaintiff firstly, must prove that he was in possession of the goods and that the defendant, without his consent interfered with that possession. Possession includes, but is not confined to actual physical possission. A master is in possession of goods, though they may be in actual possession of his servant. Similarly, a person is in construetive possession of goods in a warehouse or in a ship and the person has the document of the title by means of which he can get actual possession.

Secondly, the plaintiff has to prove that the defendant interfered with his possession. A slight interference is sufficient. It may take innumerable forms, such as scratching of the panel of a coach, removing a tyre from a car, injuring or destroying goods, or, in the case of animals, beating or killing them or injecting with disease... ......chasing cattle has been a trespass time out of mind.

Q. Define conversion. What are the various modes of conversion ?

Ans. Conversion has been defined by Winfield. "Any act in relation to goods of a person which constitute an unjustifiable denial of his title to them". Salmond defined converson "A conversion is an act of wilful intereference, without lawful justification, with any chattel in a manner inconsistent with the right of another whereby that other is deprived of the use and possession of it.

According to Underhill "Conversion which consists in the defendant's wrongfully converting to his own use and deriving the plaintiff permanently or for an indefinite time of goods to the use and possession of which the plaintiff is entitled as by taking them away, detaining them, destroying them, delivering them to a third person, or otherwise dealing with them in a manner adverse to the plaintiff and inconsistent with his right to the use and possession of them".

A take *B*'s book with an intention to steal it. This is conversion. Where *A* has been given some jewellery by *B* for safe custody but *B* sells them to *C* . This is conversion. Where *A* is bailee of *B*'s goods and he sells them in the open market this is conversion.

Modes of conversion—The following are modes of conversion :

(i) When property is wrongfully taken,

(ii) When it is wrongfully parted with,

(iii) When it is wrongfully sold in the market overt although not delivered,

(iv) When it is wrongfully retained,

(v) When it is wrongfully destroyed or changed in nature and

(vi) Conversion by denial of right.

(1) **Conversion by wrongfully taking**—It is a matter of common observation that when a person withont authority of the true owner deals with his goods, commits the tort of conversion. When any movable property is taken away for the use by defendant or any third person it is conversion. Trespass to goods and conversion often coincide but this is not always so *i.e.*, when *A* takes away *B*'s watch and passes it on to another person, it is trespass committed against *B*'s watch and if it is taken with the intention to steal it that amounts to conversion as well as trespass.

In *Tear* Vs. *Freebody* (1858) U.C.B. (N.S.) 228, defendant wrongfully took possession of certain goods with intention of acquiring a lien. It was held he was guilty of conversion.

(2) **Conversion by transfer**—A person who holds certain goods of another person, if transfers to third person who is not entitled to

them, commits the tort of conversion. A custodian who parts with the goods after his mandate to part with them has ceased is guilty of conversion.

A person who helps in lawful transfer also commits conversion. In *Hiost* Vs. *Bolt* (1874) L.R. 9 Ex. 86, the plaintiff in consequence of a telegram from their agent, consigned certain barley to the defendant, and sent him a deliverly order on production of which he was entitled to recover the barley from the carriers. The defendant, in fact, orderd no barley. The agent called him on next day and said that it was a mistake. The defendant there upon by way of setting matters right, and believing that he was in effect returning barley to the plantiff, endorsed over the delivery order to the agent, who obtained the barley and absconded with the proceeds. It was hald the defendant was liable for conversion, since he had parted with the plaintiff's property to a person who had no right to receive it.

(3) **Conversion by sale in market overt**—If in market overt the property is passed to purchaser by the sale, which is equal to physical destruction, the vendor is liable to the true owner.

(4) **Conversion by keeping**--The retention of the goods or any movable property in defiance of the plaintiff amounts to conversion. The unlawful detention is proved by the fact that the plaintiff demanded his goods and the defendant refused or neglected to comply with the demand.

In *Catterail* Vs. *Kenyon* (1842) 3 Q. B. 310 an action was brought againtst an inn-keeper and his wife. Certain cattle of the plaintiff wrongfully taken in execution had been left in a stable of the inn. The plaintiff demanded them several times from the wife.

(5) **Conversion by destruction**—Destruction does not mean burning it or breaking it into pieces, but when it is so dealt with that its identity is destroyed provided the destruction is wilful. If I make furniture of your wood, or a statute out of your marble or convert grapes into wine or turn, cotton into woven cloth, I commit the tort of converson by destruction.

(6) Conversion by denial of right—There may be conversion by a defendant if his act amounts to an absolute denial of the plaintiff's title.

In *Okly* Vs. *Lyster* (1931) I.K.B., *X* who was tenant for years of some land let 3½ acres of it to the plaintiff in order to enable him to dump a quantity of hard core on it, pending the sale of hard core. While the plantiff's tenancy was in existence, the defendant acquired the ownership of the whole land including 3½ acres of land to the plaintiff and in a letter to the plaintiff, wrongfully asserted the ownership over the hardcore dumped on land. The plaintiff sued for damage for conversion of the hardcore. The court held the defendant liable.

Q. Distinguish trespass to goods from conversion and detinue. Illustrate your answer.

Ans. Trespass to goods and conversion—Trespass to goods is wrongful interference with the possession of them. In the trespass to goods the plaintiff must prove firstly, that he was in possession of the goods and that defendant, without his consent, interfered with that possession. Possession includes but is not confined to actual physical possession. A master may be in possession though his servant may be in actual physical possession. Similarly, a person is in constructive possession of goods in a ware-house or in a ship and the person has a document of title by means of which he can get actual physical possession.

Secondly, the plaintiff has to prove that the defendant interfered with his possession. A slight interference is sufficient. It may take innumerable forms such as scratching the panel of a coach, removing a tyre from a car, injuring or destroying goods or in the case of animals beating or killing them or injecting them with disease.

Conversion was defined by Allen in *Lancashire and Yorkshire Rly. Co.* Vs. *Ma Nicall* (1919) as "a dealing with goods in the manner inconsistent with the right of the true owner, provided that there is also an intention on the part of the defendant in so doing to deny the owner's right to assert a right which is inconsistent with the owners right." In short conversion is an interference with the plaintiff's possession or right to possess together with an intention to exercise dominion over the goods.

In the case of *Foulds* Vs. *Willongly* (1841), and distinction between trespass and conversion is fully explained. The plaintiff had put his horses on the defendant's ferry boat for transportation. Some dispute arose between them and the defendant refused to carry the horses. The defendant put the horse ashore. As the plaintiff declined to leave the boat he was ferried across the river. The plaintiff brought an action for conversion against the defendant. The court held that the defendant was not liable. They observed as follows :—

1. A simply removal of a thing, although it may be a sufficient foundation for an action for trespass is not sufficient to establish conversion.

2. When the goods are removed the court should consider the intention of the defendant in doing so. In this case "If the object and whether rightly or wrongly entertained is immaterial, simply to induce the plaintiff to go on the shore himself and the defendant in furtherence of the object, did the act in question, it was not exercising over the horses any right inconsistent with or adverse to the rights which the plaintiff had in them."

3. An inter-meddling with a thing is not dispossession unless the defendant intends thereby to exercise a dominion and control over it inconsistent with a possession in any person other than himself.

Trespass to goods and detinue--Detinue is the name of common law action for conversion by detention. The wrong of detention is committed when the defendant takes a thing legally but afterwards his possession becomes illegal. *A* takes a taxi from B on hire but afterwards he refuses to give back the taxi and alleges that taxi belongs to him. Here is *A* guilty of detention. It is a fact that a detention amounts to conversion only if it is adverse to the right of the true owner.

It would be seen from the above discussion that conversion covers most of the field of detinue and trespass, and thus in most cases, wrongful detention and trrspass will also constitute conversion. But in certain cases an action for conversion shall not be maintainable where a bailee negligently loses goods or allows them to be destroyed, he is liable in detinue, since it is by his fault that he is unable to restore the goods ; but he is not liable in conversion since there is no act of wilful interference *i. e.*, no positive act of misfeasance, which is the essence of the action of conversion, there is no intention to deny the plaintiff's rights.

Again many acts which amount to trespass also amount to conversion but in certain cases there may be a trespass but no conversion.

Q. What are the various measures of damages in an action for conversion ?

Ans. Measures of Damages in Conversion—The measures for damages in an action for conversion are the following :—

(1) General Rule—value of goods,

(2) Damages beyond value of goods—special damages,

(3) Nature of plaintiff's interest,

(4) Return of chattel,

(5) Successive conversions.

(1) General Rule - value of goods—In conversion the measure of damages is the value of goods together with any special loss which is the natural and direct result of the wrong. He may for instance be awarded interest on the money lost. The main point in this connection is at what moment is the value to be selected. The general rule is that the measure of damages is calculated at the date of conversion. A plaintiff can not take the advantage of any increased valve given to movable property by work and the material expended upon it by the defendant.

In *Reid* Vs. *Fairbanks* (1853) 13 C. B. 624 the defendant had converted half built ship belonging to the plaintiff and afterwards completed it. It was held that the measure of damage was the value of vessel in its unfinished condition.

(2) Damage beyond value of goods—Special damages—In certain cases whether the circumstances are such that the defendant must we aware that the chattel converted by him is required for some particular purpose, he may be liable to pay some special damages in respect of failure of that purpose.

In *Bodly* Vs. *Reynolds* (1848) Q. B. 779 where a carpenter lost his employment through having his tools taken from him, it was held that he might recover damages for the loss of employment as well as the loss of tools.

(3) Nature of the Plaintiff's interest—(a) If the plaintiff relies simply upon a right of possession or depending on his property he can recover only according to the amount of his interest.

(b) If the plaintiff relies upon his actual possession, he is entitled to recover exactly the same measure of damage as if he were the absolute owner for to hold otherwise would be an invitation to all the world to scramble for the possession.

(c) In the case of a bailee, if the conversion is committed by a third person, he can recover full value of the thing. In the case of Winfield (1902) 85 L. T. the mails were lost in the collision between ships one of which was carrying the mails. The Post Master General was not liable to the senders of the letters and parcels of their loss. Yet he was entitled to recover their value from the owner of the ship responsible for the accident.

(4) Return of Chattel—When the chattel which were converted, if returned, cannot defeat, the cause of action for conversion. But after such redelivery the action is merely for the special damages or deterioration in value

(5) Successive conversions—If the owner of a chattel which is converted by more than two persons *e. g.*, if *A* wrongfully takes and *B* wrongfully detains it, the owner of the chattel may have remedy against *A* and *B* separately as they are not joint-tort-feasors.

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CHAPTER XVIII

DECEIPT

Q. What is meant by deceipt in the law of Tort. What are its essential elements. ?

Ans. Deceipt is a tort consisting of the making of a wilfully false statement by words or by conduct with the intent that another person shall act upon it, with the result that it is so acted upon and injury results therefrom. Winfield puts it as "Deceipt is a false statement of fact made by knowingly or recklessly *i. e.* not caring whether it be true or false with intent it shall be acted upon by *B*, who does act upon it and thereby suffers damage."

Essential elements of deceipt are :—

(i) False statement of facts,

(ii) The statement must be made with knowledge of its falsity or recklessness,

(iii) The plaintiff must rely on the statement and act upon it,

(iv) Damage should result from such acting, to the plaintiff.

1. False statement of facts :

(a) **Silent representation**—If *A* wants to bring an action against *B* for deceipt, it is necessary for *A* first to prove that *B* made a positive false statement. "In case some truth is not disclosed and which results in the deception, it would not amount to deceipt in law."

2. The statement must be made with knowledge of its falsily or it should be made recklessly—In order to give a right of action for deceipt, the representations complained of must be false. In other words there should be misrepresentation of facts. The word reckless means utter negligence.

The general principle is that in order to establish a right of action for deceipt such knowledge on the part of the defendant must be proved. For an action for deceipt it must be established that the defendant had knowledge of the falsily of the statement.

3. **Plaintiff's reliance**—For an action on deceipt it is necessary that the plaintiff may place reliance on the statement made by the defendant & he should also act on such belief. The statement must be made with the intention that it shall be acted upon by the plaintiff. The tort of fraudulent misrepresentation becomes complete when the misrepresentation not having been corrected in the meantime is a acted upon representee.

4. **Damage**—The plaintiff, in an action for deceipt must prove that he suffered damage by acting upon the false statement of facts made to him by the defendant.

Q. "No mere silence will ground the action of deceipt." Are there any exceptions to this rule ?

Ans. Mere silence is the better ground for action of deceit ? Generally speaking a non-disclosure of the truth is not actionable. But there are certain exceptions to the rule that "no mere silence will ground the action of deceipt :—

(i) "The non-disclosure of a part of the truth may make the rest of the statement false." Suppose you. state a thing partially, you make as much of a false statement as if you mis-stated it altogether. Every word may be true, but if you leave out something which qualifies it, you may make a false statement.

(ii) Active concealment of a fact is equivalent to a positive statement that the fact does not exist.

(iii) If the defendant makes a statement which he believes to be true, and he afterwards discovers that it is false and still keeps silence, it amounts to fraud.

Q. "X" represents to "Y" that "Z" is a person of good credit and financial reputation which is not the fact. "Y" on the face of these representation, enters into transactions with "Z" giving credit for large sums of money which are lost. Advise "Y".

Ans. *Y* can sue in tort for damages for fraudulent misrepresentation. *Y* must prove that *X* knew *Z* to be a man of ordinary means as that *X* made the statement concerning *Y* recklessly, carelessly as to their truth or falsity.

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CHAPTER XIX

NEGLIGENCE

Q. Define negligence as a tort bringing out its essentials.

Ans. Negligence—According to Alderson, *B's* negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

Winfield says "negligence as a tort is the breach of legal duty to take care which results in damage, undesired by defendant, to the plaintiff."

From the definitions of negligence given by various writers, it can be said that it is difficult to express, if not impossible to give a workable and scientific definition of negligence. However, the following are the definite ingredients of negligence : (i) a legal duty (ii) breach of legal duty and (iii) consequential damage.

Duty—"How is a Judge to determine whether there is, or is not a duty ? His task is easy whose earlier decisions have established one. Time out of mind it had been held that man must use care in driving vehicle on the highway, in handling deadly implements or substances, in playing their trades where their neighbours are about ....But the categories of negligence are never closed.

In English Law there must be, and is some general conception of relation giving rise to a duty of care : of which the particular cases, found in the books are instances. The liability for negligence whether you style it such are treat it as in other systems as a species of "culpa" is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omission which any moral code would censure cannot in a practical would be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent to their remedy. The rule that you are to love your neighbour becomes in law, "you must not injure your neighbour" and the lawyers question, who is my neigh,-bour, receives a restricted reply. You must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour, who, then, in law, is my neighbour ? The answer seems to be persons who are so closely and directly affected by my act or omission which we called in question." Per Lord Atkin in *Donoghue* Vs. *Stevenson* (1942). Accordingly the duty towards persons who are in contemplation of the wrongdoer and closely and directly affected by the negligent act. This negligence "is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affair, would do or doing something which a prudent and reasonable man would not do."

The care taken by a prudent man has always been the rule laid down ; and as to the supposed difficulty of applying it, a jury has always been able to say whether taking that rule as guide, there has been negligence on the occasion in question. Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to causation such as a man of ordinary prudence would observe. "Per Tindal C. J. in *Vaughon* Vs. *Meullove* (1837) where the defendant inspite of repeated warnings as to the risk of his hayrick becoming ignited by spontaneous combustion said "he would change it." The rick ultimately burst into flames, and the fire spread to the plaintiff's cottage, for the destruction of which the defendant was held liable.

Whether care has been taken, is or is not reasonable, is a question, the answer to which must depend on circumstances of each case". The standard of foresight of the reasonable man, is in one sense an impersonal test. It eliminates the personal causation and is independent of idoisyncracies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset by lions. Other, of more robust temperament fail to foresee or nonchalanty disregard even the most obvious dangers. The reasonable man is presumed to be free both from over apprehension and from over confidence, but there is a sense in which the standard of a care of the reasonable man involves in its application a subjective element. It is left to the Judge to decide what in the circumstances of the particular case, the reasonable man would have had in contemplation, and what accordingly, the party sought to be made liable ought to have foreseen."

To sum up negligence consists in the omission to do something which a prudent and reasonable man would do or the doing of something which prudent and reasonabld would not do, and is actionable whenever, as between the plaintiff and the defendant, there is duty cast upon the latter not to be negligent, and a breach of his duty causes damage to the plaintiff.

Q. Explain the fac's and the principles laid down in the case of *Donoghue* Vs. *Stevnson* (1932) A. C. 562. (L. U. 1975)

Ans. *Donoghue* Vs. *Stevenson* (*1932*) (A. C. 562—The appellant and her friend vistied a cafe ; where her frtend ordered for her some ice-cream and a bottle of ginger beer. These were supplied by the shopkeeper, who opened the ginger beer bottle and poured some of the contents over the ice-cream which was contained in a tumbler. The appellant drank part of the mixture, and her friend then proceeded to pour the remaining content of the bottle into the tumbler. As she was doing so a decomposed snail floated out with the ginger beer. In consequence of her having drunk part of the contaminated contents of the bottle the appellant alleged that she contracted serious illness. The bottle was stated to have been of dark opeque glass, that the condition of contents could not be ascertained by inspection, and to have been closed with a metal cap, while on the side was a label bearing the name of the respondent, who was the manufacturer of the ginger beer of which the shopkeeper was merely retailer. It was held by a majority of House of Lords that in circumstances the respondent owed the appellant a duty of care. The House of Lords laid down, in the course of the decision, the general test for deciding whether a duty take care exists. They noted.

(1) The manufacturer of an article of food, medicine or the like sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defeet likely to cause injury to health. Lord Macmillan said "I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption, he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent when he manufactured his ginger beer, had directly in contemplation that it would be consumed by members of the public; can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger beer.

(2) It must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is not too remote from the carelessness. Thus where a manufacturer has parted with his product and it has passed into other hands, it may well be exposed vicissitudes which may render it defective or noxious, the

manufacturer cannot be held liable. It may be a good general rule to regard responsibility as ceasing when control ceases. So also where between manufacturer and the user there is interposed a party who has the means and the opportunity of examining the manufacturer's product before he reissues it to the actual user. But where as in the present case, article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer and the manufacturer takes step to ensure this by sealing or otherwise closing the container, so that the content cannot be tampered with his control remains effective until the article reaches the consumer and the container is opened by him.

(3) The fact that there is contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties independently of the contract though arising out of the relationship in fact brought by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for the breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort.

'On further point it may be noted. The principle in Donoghue's case can only be applied where the defects is hidden and unknown to the consumer otherwise the directness of the cause and effect is absent; the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition choosing to incur risk or certainty of mischance.'

In the present case, the presence of the deleterious chemicals and the pants, due to negligence in manufacture, was hidden on latent defect, just as much as were the remains of the snail in the opaque bottle; it could not be detected by any examination that could reasonably be made. Nothing happened between the making of garment and their being worn to change their condition, "the garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant, it was not contemplated that they should be first washed. It is immaterial that the appellant has a claim in a contract against the retailer, because that is quite independent cause of action based on different consideration, even though the damage be the same. Finally irrelevant is the question of liability between the relatives and the manufacturer on the contract of sale between them. The tort liability is independent of any question of contract."

In Grant's case it was further argued for the manufacturers that there was much greater possibility of intermediate tampering with the goods before they, reached the user than there was with the sealed bottle in snail's case, but the Privy Council held that a mere possibility of interference did not affect their liability, if actual tampering had been proved that would have been another matter.

In the above case, therefore, both the manufacturer and retailer are liable in damages, the former for negligence and the latter in contract because the retailer owes a contractual obligation amounting to a condition of warranting in certain cases under the Sale of Goods Act.

Q. What duty for care is imposed by law towards the following class of persons :—

(1) A trespasser.
(2) A licensee.
(3) An invitee.
(4) Passers by, lawfully passing through.

Ans. In a society in which we live it is the duty of every person to exercise due care so that others are not put to undue risk of injury in respect of their person or property. When we do not exercise due care and by our carelessness cause injurey to the person or property of others we are called negligent and this negligence renders us liable to civil liability as well. It may also make us criminally liable but we are concerned with civil liability only in law of tort. Let us see low much care we are expected to exercise in respect of following persons :—

1. A trespasser—A trespasser is one who goes on land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. He is a person who enters into anothers property without any right or permission. In such cases where a person is a trespasser on your land, the general rule is that there is no duty of care towards such persons. He who enters wrongfully does so at his own risk and responsibility in all respects. The occupier of the land has no duty to take reasonable care for his protection or even to protect him from concealed danger. It would not be incorrect to say that the duty that an occupier has towords a trespass is least recognised by law. The most we can say is thet whereas we have no duty to exercise any care for the protection or property of a trespasser, are not expectted to cause injury to him by our wilful act in reckless disregard of ordinary humanity. "An occupier is liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser." We may here take a specific example to ilustrate the above. Sometimes people set up spring guns in their garden. These spring guns and their treggers are hidden in the grass and if a trespasser visits the garden the triggers are pressed by the feet of the trespasser. The result is that the trespasser is hit and injured. The occupier of the land must not set up a spring gun in his garden unless he can justify his action as being merely a reasonable measure of self-defence. Similarly an occupier should not set a naked live electric wire of high voltage on his land with a deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespasser. In short, an occupier should not do anything to punish intruders in a cruel manner altogether disproportionale to the injury done by the tresspasser.

2. **A licensee**—A licensee is a person to whom permission is given to entre a certain premises. This permission may be express or implied. A bare licensee has a right only to use the place as he finds it. Any complaint by him may be said to wear the colour of ingratitude so long as there is no plan to cause injury to him. The licensee must take care of himself and no action will lie under the law of tort, unless the accedent by which he receives injury has been caused by the negligence of the owner of the land or the occupier of the lend. The occupier of the land is duty bound as follows :—

(1) The duty of the occupier is to caution the trespasser against any known insecurity or hidden danger which is not such that it can be easily discovered. If the danger is obvious the licensee must look out for himself.

(2) The owner is under no liabilty as to existing traps, but at the same time he should not create new traps or hazards without taking precautions to protect the licence against them.

If compared with trespasser, the licensee occupies a legally superior position in the sense that the licensee is entitled not to have the condition of the premises so altered os to set up a trap for him.

(3) **On invitee**—On invitee is a person who enters the premises of the occupier for some purpose in which he and the occupier have a common intesest. The invitees may be :—

(i) Those who do not pay for their presence on the premises, and

(ii) Those who use the premises on payment.

With regard to in invitee no (i) the invitee using reasonable care on his part for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damge from usual danger which he knows or ought to know.

The duty of the occupier in respect of invitee no. (ii) above is greater. "where the occupier of premises agrees for reward that a person shall have a right to enter and use them for a mutually contemplated purpose, the contract between the parties contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them.

The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises."

It may be noted here for the purpose of better understanding of the legal position of invitees that the invitor and invitee have common interest but the licensor and licensee have none.

(4) **Passersby**—It is the duty of the owner of the premises to guard the passersby against what may happen just beyond the premises, on the road or other place where the passerby lawfully may be. In the case of *Terry* Vs. *Ashton*, and *Byrne* Vs. *Beable* it was clearly brought out that it is incumbent upon the owner to show that used that amount of reasonable care and diligence which he was bound to use.

Q. 'L', the lorry owner, took a wheel of the lorry to the workshop of Excellents Motor Repairs Crmpany whose servants after repairing the wheel fitted the same on the lorry. 'S', a servant of the lorry owner drove the truck and while he was so driving, the wheel came off, with the result that the lorry mounted the pavement injuring "M". "M" brings suit against both 'L' and Excellents Company for negligence and nuisance. Can "M" sue against both or any one of them ?

If Excellent Company takes up the plea that it owned no duty to 'S', would that plea succeed. Give reasons for your answers.

Ans. That facts of the given case are similar to those of *Herschotal* Vs. *Stewart and Arden Ltd.* (1940) I. K. B. 155. It was held in that case that the lorry owner having entrusted the repair of the lorry to a competent repairer was not liable either for negligence or nuisance to a person who suffered injury on the road by reason of the competent repairer having been negligent, that the lorry owner was not under a duty to ascertain for himself, whether the competent repairer had completely repaired the lorry, that the repairer was liable to the person who suffered injury on the road as a result of his negligence, as he was in the same position as that of the manufacturer of an article sold by a distributor or ultimate purchaser or consumer for discovering by inspection any defect in the article.

Q. 'A', a fisherwife who was pregnant got down from a bus, while the conductor was helping her to put her fish basket on her back 'Y'a motor cyclist passed by the bus and immediately afterwards, owing to "Y's" negligence collided with "X's" motor car. 'Y' was killed 'A' did not see the accident which occured a few yards off, because her view was obstructed by the bus, but she heard the collision. After "Y's" body had been removed 'A' approached the spot and sustained a nervous shock from seeing the blood lying on the rood. Owing to shock she could not do her business for sometime. She used the representative of 'Y' for negligence. Decide.

Ans. In this case *A* cannot recover damages from *X*. It is true that *A* suffered damages but infliction of injury to *A* does not give a cause of action. *Y* is not guilty of breach of duty owed by him to *A*.

In *Bournhill* Vs. *Young* (1943) A. C. 62 where facts were the same as of the case given above, it was held that Yong's estate is not liable as he had been guilty of no breach of duty owed by him to Hay. They observed as follows :—

(1) *A* suffered substantial damages owing to the conduct of motorist but the infliction of damage on the plaintiff does not itself gives a cause of action. Damage due to the legitimate exercise of right is not actionable, even if the actor contemplates the damages. It is *damnum obseque injuria*. The damage must be attributable to the breach by the defendant of same duty owing to the Plaintiff.

(2) In ascertaining whether there has been a breach of duty it is relevant to determine whether any reasonable person would foresee that the act would cause damage, if he acts in a negligent manner ; you must take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour. "And neighbour means any person" so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am direcring my mind to the acts and omissions which are called in question.

(3) The general concept of reasonable foresight as the criterion of negligence or breach of duty may be criticised as too vague. But negligence is a fluid principle which has to be applied to the most diverse condition and problems of human life. It is a concrete and not an abstract idea. It has to be fitted to the facts of a particular case. In present case *X* was certainly negligent in an issue between himself and the owner of the car which he ran into, but it is another question whether he was negligent *vis* a *vis A*.

(4) In order to determine the question the same test of reasonable foresight has to be applied. In the present case a question arises whether *A's* illness was due to her peculiar susceptibility. She was pregnant. "Can it be said, apart from every thing else, that it was likely that a person of a normal nervous strength would have been affected in the circumstances by illness as *A* was ?"

"Does the criterion of reasonable foresight extend beyond people of ordinary health or susceptibility or does it take into account the peculiar susceptibilities or infirmities of those affected which the defendant neither knew of nor could reasonably be taken to have foreseen ? If extreme cases are taken, the answer appears to be fairly clear. One who suffers from the terrible tendency to bleed on a slight contact, which denoted by the term "bleeder" can not complain if he mixes with the crowd and suffers severely, perhaps fatally, from merely being brushed against. There is no wrong done there."

(5) In the same way where nervous shock to plaintiff results from the carelessness of the defendant, but the shock is due to abnormal susceptibility of the plaintiff, the plaintiff does not come within the ambit of the defendant's duty to take care, the defendant is not liable.

Q. (a) 'D', with a pick axe chased a boy who ran into neighbouring china shop of 'Q' to save himself and in so doing knocked dows valuable china crockery. 'Q' filed a suit against 'D' for damages. 'D' pleads that she damage was, in fact caused by an independent act of the boy and that 'D' could never foresee that the boy would run into the china shop. Is "D's" plea sustainable ? Give reasons.

(b) 'P', who had gone to the railway station to meet his daughter arriving by the avening train, while assisting his daughter in getting luggage out of her compartment over an oily patch on the platform which he had not noticed, fell and received injury. Can 'P' recover for his injury from the Railway Company ? Give reasons.

Ans. (a) *D*'s plea is not maintainable and he would be liable for damages for the loss crockery. (*Vandenburgh* Vs. *Truax* (*1847*) *4 Devis 464*). The defendant is liable for any damage which is direct consequence of his unlawful act, whether he intended consequence or not and whether he could have reasonably forseen it or not.

(b) '*P*' can recover damages for injury from the railway Co. In *Stowell* Vs. *Railway Executive* (1949) 2 All, E. R. 173 where the plaintiff received injury when he fell down on the railway platform. It was held that a friend or relation of a passanger who goes to railway station to send '*H*' or receive him has been a invite of the railway authority.

Q. Discuss the liability for negligence of the following :—

(a) Solicitor,
(b) Bankers,
(c) Innkeeper, and
(d) Carrier.

Ans. **(a) Solicitor**—Solicitors are the person of skill and knowledge. Like physician they undertake matters of much difficulty and importance. Any negeligence on their part may cause great loss to clients. A solicitor is liable for the consequence of ignorance of the non-observance of the rules of practice of the court. He is also liable for the want of care in the preparation of the cause for trial or of attendance thereon with his witness and for the mismanagement of so much of conduct of a cause as is usually and ordinarily allotted to his department of the profession.

A solicitor is liable if his client proves negligence operating to produce the loss of the cause *e. g*, allowing a claim to be barred by limitation. He is also liable for the negligence of his agent or partner.

Where a solicitor is guilty of negligence or misconduct, the court may order him to make good any loss occassioned by such negligence or misconduct. But where the loss does not flow from his act or default, the court will not make liable for damages merely because he has been guilty of misconduct.

Indian Law—An advocate is liable to an action for damages at the suit of his client, for *mala fide* breach of duty or wrong independent of contract.

(b) Bankers—Bankers hold themselves out as persons worthy of trust and as persons of skill. Their duty in respect of paying their customer's cheque is to honour them to any amount not exceeding the credit value due to the customer from the banker at any material time. Failure to do so constitute negligence and the banker are liable in damages. Bankers are liable for negligence in praying forged cheques. The Privy Council has laid down that the negligence on the part of the customer in drawing a cheque (*e. g*., cheque drawn with spaces so that a forger can utilise them) does not by itself disentitle him from recovering the extra amount paid by the banker. The House of Lords held that a customer of a bank owes a duty to the bank in drawing a cheque to take reasonable precaution against forgery, and if as the natural result of the negelect of those precautions, the amount of the cheque is increased by forgery, the customer must bear the loss.

Innkeeper—An innkeeper is one who maintains a common inn for the lodging house and entertainment of travellers and passengers, their horses and attendant for a reasonable compensation. A person who keeps a private boarding and lodging house is not an innkeeper. An innkeeper is bound to provide lodging and entertainment for all at a reasonable price if he has accomodation ; not so a boarding house keeper. He must guard their goods with proper deligence. He is not an insurer of the goods but is liable for negligence.

In Calye's case it was held that innkeeper who at the request of his guest, sent his horse to pasture and the horse was stolen was not liable for the loss. He is also not liable if the guest's friend or servant steals or carries away the goods.

The liability of an innkeeper with respect to personal safety of his guest is not very difficult. He does not insure the personal safety of the guest. The guest is an invitee and the innkeeper as the occupier of premises to which he has invited the guest is bound to take reasonable care to prevent damage to the guest from unusual danger which the occupier knows or ought to know of. But further by reason of contractual relationship existing between an innkeeper and a guest there is an implied warranty by the innkeeper that the premises are as safe as reasonable care and skill on the part of any one can make them. The innkeeper is not responsible for defects which would not have been discovered by reasonable care and skill on the part of any person concerned with the construction, alteration, repairs or maintenance of the premises.

(d) **Carriers**—Carriers are of two kinds :

(i) Carriers of goods, and
(ii) Carriers of passengers.

(i) Anyone who undertakes to carry the goods of all persons indifferently for hire is a common carrier. A carriers of passengers, however, is not a common carrier. Common carrier of goods are of two types :—

(a) Carrier by land *e. g.*, proprietors of stage coaches and omnibus and also trunkmen, waggoners, team morters, cartmen *etc.* Carrier by land is bound to carry all goods offered for transportation by any person. He must take utmost care of those goods from the moment of receiving them.

(b) Carriers by water *e. g.*, coasting ships, steam boats *etc.* A carrier by water is bound to provide a ship tight, staunch and strong and to guard against all injuries incidents to the property.

Common carriers are liable for loss or injury to goods even though there may have been no negligence except where the loss or injury is caused by an act of God or the King's enemies or an inherent vice or defect in the goods carried. The carrier may limit his liability by means of a special contract or of conditions.

(ii) Carriers of passenger are of two descriptions :

(a) Passenger carriers on land, and
(b) Passenger carriers on water.

(a) Passenger carriers on land—In regard to their liability for the luggage of passengers, articles of necessity and personal convenience they stand upon the ordinary footing of common carrier. Railway companies are bound to use proper care and skill in carrying their passenger but they are not liable independently of neglience.

(b) Passenger carriers by water—They are under the same obligation with respect to the safety of passengers as carriers by land.

Q. Discuss the maxim "*Res ipsa loquitor*. (L.U. 1978)

Ans. *Res ipsa loquitor* means the thing speaks for itself. It is a sort of exception to the rule that in an action of negligence the burden of proof is on the plaintiff. Sometimes the things speak for itself. This is in the sence that in same circumstances the mere fact of an accident happening raises an inference of negligence so as to establish a *prima facie* case.

Lord Shew in *Ballard* Vs. *North British Rly.* expresses his views about its use and application in the following words "(i) It is the expression in the form of maxim *i. e.* that is a thing tells its own story, not always, but sometimes (ii) But, although a thing tells its own story, that is not necessarily the whole story. Accordingly (iii) When the story would seem relevant......to infer liability for some occurrence out of the usual remainder of the story may displace that inference. But (iv) If the remainder of story does not do so then the inference remains : *res ispa loquitor*.

In *Scott* Vs. *London and St. Katherine's Docks Co.* (1865) 3 Hand C. 596 where the plaintiff a Custom Officer, whilst lawfully passing at the doorway of the defendant's ware-house in the docks was injured by six bags of sugar falling on him. It was held that there was reasonable evidence of negligence.

For the application of this maxim three requisities are required :—

(i) The thing which causes the harm must be under the control of the defendant.

(ii) While under his control and accident happens which would not in the ordinary course of things happen without negligence, and

(iii) The defendant gives no explanation.

The maxim imposes the burden of proof on the defendant if he is to succeed in the action brought against him. The following points may be noted in this connection :—

(a) A case of *res ispa loquitor* raises presumption that the negligence of the defendant caused the accident. If the defendant calls no evidence relating to the issue of negligence, it is sufficient foundation for finding liability against him.

(b) If the evidence adduced by the defendant, although he is unable to prove how the accident happenes, satisfies the court that he was not negligent the plaintiff fails.

(c) If the evidence of the defendant taken in conjuction with the fact of accident leaves the evidence as a whole in even scales, just as consistent with the defendant not having been negligent as with his having been negligent, then the plaintiff has failed to establish his case.

(d) There are two views as to the burden of proof resting on the defendant:—

(a) that the burden of disproving negligence is on the defendant, and

(b) that there is a burden on the defendant to produce reasonable explanation but it does not extend to disproof of negligence.

Q. 'A' barrel of flour rolls out of an open door way on the upper floor of 'X's' ware-house and fell upon 'Y' who is passing in the street below. For an action by 'Y', 'X' pleaded that he is not negligent. Decide

Ans. *X* shall be liable for damage. It is a case of *res ipsa loquitor*. The fact of falling of barrel of flour speaks of itself.

In *Byrne* Vs. *Boale* (1893) 2 H. & C. 722 where a barrel of flour rolled out and injured plaintiff, a passerby in the street below. It was held that it was sufficient evidence of negligence without any evidence as to manner in which the accident happened.

Q 'A' admitted at Medical College, Lucknow for an operations on two fingers of his hand. During the post operational treatment 'A' complained of servere pain but the surgeon incharge at the operation and the house surgeon prescribed sedative drugs. At the end of the treatment his whole hand was found to be useless. Are Hospital authorities liable for negligence ?

Ans. Hospital authorities are liable for negligence and *A* can recover damages. The test of the organisation and subordination to the employers managerial powers would apply.

In *Cassidy* Vs. *Ministry of Health* (1951) 2 K. B. 434 the plaintiff entered the defendant's hospital for an operation on two fingers of his hand. Before operation the plaintiff complained of severe pain but the surgeon incharge of the operation prescribed sedative drugs. At the end of the treatment his whole hand was found to be useless. It was held that the hospital authorities were negligent and hence the plaintiff could recover.

One Judge was of the view that the hospital is liable on the ground that all surgeons, nurses and other members of the hospital were employed under the contract of service and therefore the hospital was vicariously liable.

The other Judge suggested a different ground for the liability of the hospital. He was of the opinion that the hospital was under an obligation to provide competent treatment.

According to third Judge, hospital must be made liable as it owed a duty of care.

Q. An elephant was standing on a railway track. It did not leave the track although the driver blew the whistle and opened the waste cock through which steam was released from the engine. The purpose was to scare away the animal. It changed the engine and fell down. Later on it died. Discuss the liability of the railway for the damage caused to the owner of the elephant. Is he entitled to damages.

Ans— No. The ower of the elephant is not entitled to away damages because the elephant was not on the track as a matter of rights. It was a trespasser and the action of the engine driver was not such as would entitle the owner of the animal to damages as against the railway management.

Q. Can 'A' who is a local authority be held liable for the negligence of marton of a maternity home established by 'A' when a medical officer of health was on the supervisory staff whose services can be terminated only with the consent of ministry of health.

Ans. *A* shall be liable for the negligence of marton who is as the agent of *A*.

In *Lindsey C. C.* Vs. *Marshall* (1973) : A. C. 97 a maternity home was provided by a local authority. The home was under the general supervision of the Medical Officer of Health who was appointed by the authority but was dismissable only with the consent of Ministry of Health. The home was actually managed by a matron who was visited once a week by the Medical Officer, who advised her. After a case of puerperal fever certain precautions were taken. Subsequentely, a patient developed temperature but it was never diagnosed as puerperal fever. A day or two latter a patient was admitted to the home and developed the same fever.

The jury found negligence against the Medical Officer and against the matron for failing to warm the patient or for failing to close the home.

On appeal the House of Lords gave judgment for the plaintiff and opined that there was evidence of negligence and that in receiving the patient the hospital officials were acting as the agent of local authority. They were not providing medical treatment but receiving the patient into authority's home in circumstances that could be called negligent.

Q. Illustrate and state the doctrine of contributory negligence.

Ans. When a man is not careful about his activities he may be declared by the courts negligent and may be held liable for his act or omission. But law at the same time provides a special type of defence by which he can save himself from the liability. This defence may be called as "contributory negligence."

Under Roman law the rule on contributory negligence has been expressed thus '*Quad quis ex culpa sue damnum sentit, non intelligentur damnum sentire* (The harm I bring upon myself I must bear myself).

A man is guilty of contributory negligence when he has by his own negligence contributed to the damage caused by the negligence of another person. "If though the defendant has been negligent, the plaintiff has also been negligent."

In English Law for the first time this rule of contributory negligence was fouuded in *Butterfield* Vs. *Forrester* (1809) 11 East 60. In this case the defendant obstructed a highway by putting a pole across it and the plaintiff who was riding violently on the road in the dusk was overthrown by the pole and was injured. If the plaintiff had not been riding so violently he might have seen and avoided the obstruction. But he rode against it with his horse and was hurt. The plaintiff was held guilty of contributory negligence and the defendant was not held liable. Bayley J. said :

> "If he had used ordinary can he must have seen the obstruction ; so that the accident appeared to happen entirely from his own fault."

In *Devis* Vs. *Mann* (1842) the plaintiff tied the forefeet of his donkey and turned it on the highway to graze. The defendant's servant by the negligent driving of a wagon knocked down and killed the donkey. It was held that although the plaintiff might have been guilty of negligence, and although that negligence might have in fact contributed to the accident, yet if the defendant could in the result by the exercise of the ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence would not excuse him.

In contributory negligence the ultimate question is "who caused the accident ? The case of *Butterfield* Vs. *Forrester* lays down that if the accident is caused by the plaintiff, he is guilty of contributory negligence in spite of the defendant's negligence.

Devis Vs. *Mann* lays down that the accident is caused by the defendant, the plaintiff can recover in spite of his own negligence.

In *British Columbia Electric Company* Vs. *Lonch* (1916) A. C. one Sands was being driven in wagon by *X* who by the negligence of both himself and Sands, drove the wagon on the railway company's level crossing. The Engine Driver first saw the wagon when the train was 400 feet from the crossing. He at once applied the brakes. Had the brakes been in good order the train would have stopped at 300 feet. But owing to their defects the train hit and killed Sands.

In an action by the personal representative of the deceased against the train way company it was held that "the defendant could not set up the contributory negligence of the deceased as the last opportunity of avoiding of the accident was on the driver who owing to defect in the brakes, failed to exploit so as to avert the harm." The party who has the last opportunity of avoiding the accident is the person responsible.

Now-a-day, that is, since the passing of the Law Reform (Contributory Negligence) Act 1945, the question of contributory negligence is material in apportioning damages. *A* Plaintiff who is guilty of countributory negligence would be awarded damages less than one who is not guilty of contributory negligence.

Q. State how far has the doctrine of contributory negligence been modified by recent legislation.

Ans. Modification of Doctrine of contributory negligence—The law of contributory negligence has undergone a serious change in England since the passing of the Maritime Conventions Act 1911 and the Law Reform (Contributory Negligence) Act of 1945. Maritime Convention Act 1911 authorished the courts, in the case of collisions at sea to apportion the loss according to the degree to which each party was at fault, and the principle was made general applicable by the Law Reform Act of 1945 to all kinds of cases of negligence where contributory negligence was pleaded as defence. This Act has greatly modified the whole conception. Thus it has been held that there was no contributory negligence where a slinger, who was engaged in unloading goods by a crane, if overlanded the crane by mistake and was injured (*Collogher* Vs. *Dorman Long & Co.* (1947 *2 All. E. R.* 38)

If an employer was under statutory obligation to provide his employee with goggles for the process of a particular employment, then if he is injured, he cannot be held guilty of contributory negligence. Again where an experienced and competent steel erector to whom the task of selecting suitable gear had been delegated, used, and fell from a ladder which was unsuitable and unsafe for the work in question, he was held not guilty for contributory negligence.

In the case of *General Cleaning Contractors* Vs. *Christinas* (1953) A. C. 180, a window cleaner, while cleaning a window, 27 feet from the ground, standing on a narrow sill and securing has balance by holding on to lower sash was injured owing to the negligence of employer to provide hooks, safety belt or the like. In a suit filed by the servant (Plaintiff) the defendent (employer) pleaded that if the servant used a safety belt, the injury might not have happened. But he was held liable by the House of Lords. It was laid down that "where an employee works in the usual manner as the employer expected him to do it and the employer has failed to take the step necessary to keep the system reasonable safe, the employer cannot contend that the employee could have ovoided the injury by himself taking precautions. He has the right to expect the system to be reasonably safe, having regard to the dangers necessarily inherent in the operation.

Problems

Q. (a) 'A' is lying drunk on a certain busy road. 'B' approaching in his car runs over 'A'. 'B' just before the accident was not keeping proper look out as he was talking with 'C' who was sitting beside him.

(b) 'X' driving his car stopped suddenly in the middle of the road. 'Y' who was just behind him at once applied the brakes of his car to avoid the impact with 'X's' car, 'X's' car was badly damaged. Advise 'A' and 'X'.

Ans. (a) *A* should bring an action against *B* for negligence. As to the question whether *A* has been guilty of contributory negligence, the main question to be considered is "who caused the accident"? In the first case although *A* was negligent still the accident was caused by *B*. *B* had the last opportunity of avoiding the accident but he could not avail of it owing to his own negligence in not keeping a proper look out. *A* is not guilty of contributory negligence.

(b) In this case, although *X* was negligent, still if *Y*'s car had good brakes the accident would have been avoided—*Y* who had the last opportunity to avoid the accident, could not avail the opportunity because the brakes were out of order. *X*, is not guilty of contributory negligence.

Q. 'A' was passenger on the top of 'B's' coach. Owing to the breaking of a defective copling rein the coach was in imminent danger of being overturned. 'A' during emergency jumped from the coach and breaks his leg. Can 'B' take the plea that 'A' selected the wrong made of avoiding the risk.

Ans. *A* is entitled to substantial damages. The conduct expected of *A* is only that of a reasonable man and the defendant will not escape liability if, by his negligence be puts the plaintiff in a position of imminent peril causing him to take mistaken step. "Where the plaintiff is placed in a dilemma as a result of the defendant's negligence, his choice of wrong alternative in the agony of the moment is not treated as contributory negligence." In the Bywell Castle case (1879) 4 P. D. 219 the negligent navigation of the defendant's ship placed the plaintifl's ship in extreme danger with the result that the master of the plaintiff's ship had to make a decision immediately. The decision taken was a mistaken decision but having regard to the situation of imminent peril in which the master found himself, the court held that his decision could not fairly be regarded as negligent.

Q. 'C' a girl aged five was being taken across the road by her governess, when she was knocked down by a motor car driven by 'D'. At the trial it was proved that 'D' was negligent. Can 'D' plead that the girl cannot recover owing to contributory negligence of the governess ?

Ans. A child is entitled to succeed against a negligent defendant who has caused the injury inspite of the contributory negligence of the adult in whose care the child for the time being is. This rule has been laid down in Oliver Birmingham and Midland Omnibus Co. (1938) I. K. B. 35.

Q. 'A' leaves his car which has broken down, standing across a road on a foggy morning. 'B', a motor cyclist is approaching the car from the rear is travelling too fast to see the car in time to avoid a collision. Can 'B' recover any, and, if so, what damages from 'A' ?

Ans. In the present case both *A* and *B* are to blame the former by leaving a car in such a position that it becomes an obstruction to the traffic and the latter for running too fast to avoid the danger. *B*, no doubt, had the opportunity to avoid the accident by the use of a reasonable care. But the doctrine of lost opportunity as embodied in the decison of *Devies* Vs. *Mann* was rendered absolute by the Law Reform (Contributory Negligence) Act 1945. *B* is not wholly to blame merely because his negligence was subsequent to *A*'s negligence as there has not been a sufficient separation of time, place or circumstance" between A's and *B*'s negligence. Though *B* has been guilty of negligence his claim of damages agains *A* is not defeated. But under the provisions of Act of 1945 he is entitled to recover only that amount of damages which the court thinks just and reasonable having regard to his share in the responsibility of damage.

In *Harvey* Vs. *Road Hanlage Executive* (1752) I. K. B. where the facts were almost the same as in the case given, the Court of Appeal held that no valid distinction could be drawn between negligence after seeing a danger and negligence in not seeing it ; and that the plaintiff and defendant were equally to blame so that the plaintiff could recover half the damages.

Q. Do you agree that Rule of last opportunity is no longer the law ? Support your answer citing authorities.

Ans. The last opportunity rule first founded in *Devis* Vs. *Mann* (842) 10 M and W 546 where the plaintiff tethered the forefeet of donkey and left it on the highway to graze. The defendant servant by the negligent driving of the wagon knocked down and killed the donkey. The defendant was held liable.

No doubt the plaintiff had been negligent in leaving the donkey on the highway but the last opportunity of avoiding the accident was at the hands of the defendant. The accident occurred due to non-observance of care by the defendant and, as such, he had to pay damages.

In this case Baron, Parke in approving the trial Judges instruction to the Jury said, "Although the ass may have been wrongfully there still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so a man might justify the driving over goods left on a public highway or even a man lying asleep there as the purposely running against a carriage going on the right side of the road."

The last opportunity again found favour in Molean's case (1932) 47 LT 262. In this case the plaintiff alighted from a tram car with the intention of crossing to a shop on the opposite side of the road. When she had crossed as far as the middle of the further train line, she was struck by motor car which carried her 20 yards before it stopped. The case was tried twice by the jury and on each occasion held that the plaintiff's injury was due to the negligence of the defendant. It was held by the House of Lords that the plaintiff was negligent to some extent, but "on that assumption, however, there was a further question still for the jury namely, whether assuming her to be negligent in that sense, the defendant could yet by the exercise of reasonable care, have avoided striking her."

This last opportunity rule in contributory negligence to a large extent has been affected by the enactment of the Law Reform (Contributory Negligence) Act, 1945. It is clear that this Act contains no reference to last opportunity rule but they must be considered in relation to each other. The words of Section I (i) are as follows :

"Where any person suffers damage as result partly of his own fault and partly of any other person or persons, a claim in respect of that damage shall not be defeated by reason of that fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility of the damage."

There have been conflicting views regarding the relationship between the Law Reform (Contributory Negligence) Act of 1945 and last opportunity rule.

Asquith L. I. in *Hevley* Vs. *Comroom* (1948) 65 TLR 11 said "In my view, the Law Reform (Contributory Negligence Act 1945, has not abolished the rule of "Last clear opportunity." The framers of the Act cannot imaginably have had within their purview this rule however, much primed or qualifiefl. If they had inteded to abolish it or its remnants nothing would have been simpler than to have said so plainly. The wording of section I (i) of the Act seems to me to believe any such intention, or, at least, to produce no such effect."

Professor Glanville Williams has adopted contrary view. He observed :

"Now that apportionment is possible in cases of contributory negligence, it is necessary to drop the rule of last opportunity and now that contribution and indemnity are possible between joint tort feasors. It is necessary to modify the rules as to *novus acts intervenieus*' ....would it not be unfortunate if we now hare a statutory power of apportionment ?............If the last opportunity rules survive there will be no simplification but only further complexity."

The same conclusion was reached by Denning L. J. in *Devis* Vs. *Swan Motor Co Ltd.*, when he said.

"The answer to my mind is that, as doctrine of law, it was dead before the Act, though it remained in use by some as practical test. Since the enactment of Act, it is no longer a practical test, and should disappear from the books."

The rule of last opportunity is, now, no longer a law. As the damages are apportioned according to the negligence of the plaintiff and the defendant, the question of holding defendant liable does not arise.

In *Jones* Vs. *Livox Quarries* (1952) 2 Q. B. 603 the plaintiff a quarryman, was injured while travelling on one of his employer's tractor contrary to orders. It was held that the plaintiff was one fifth to blame and his damages were reduced by that amount.

In *Stapley* Vs. *Gpysum Mines* (1953) AC 663, the plaintiff, a miner, was ordered to take down an unsafe roof. Finding it difficult to do so he abandoned the attempt and worked under the roof. The roof collapsed and he was killed. It was held that he was eighty percent to blame and his widow recovered twenty percent of the damages.

Q. (a) Discuss briefly the rule of contributory negligence as applicable to children.

(b) 'A', the owner of the fence adjoining a highway, allowed it to be kept in a rotten condition. 'B' , a boy in attempting to climb it, which he had no right to do, is crushed and injured. 'B' sues 'A' for damages sustained by him. Can he recover ?

(c) 'A' is a tenant of a house through the negligence of 'B', a servant of 'A', the house is set on fire and burnt down. Is 'A' liable to landlord ?

Ans. (a) If the plaintiff is a child or other person in some form of personal disability, it is enough if he shows as much care as a person of that kind may reasonably show. He will not lose his remedy simply because a person of full capacity might, by using full care, have avoided the accident.

In *Lynch* Vs. *Nudin* the defendant left his cart and horse unattended, negligently in a street. The plaintiff aged seven years climbed into it. Another boy drove the horse. The plaintiff fell down and was injured. It was held that the defendant was liable because no one can except better care from a child of seven years.

In *Harold* Vs. *Wainey*, the defendant occupied land adjoining the highway. It was surrounded by a fence which was rotten and dangerous. The plaintiff was a boy aged four years. He climbed over the fence to look over the land. The fence fell down and with it fell the plaintiff and was injured. It was held that the plaintiff has a good cause of action, against the defendant. But it should be born in mind, that in every case of child receiving injury is not actionable. Two things must cover before the defendant is liable for the injuries of a child. Firstly, there must be a duty on the part of the defendant towards the child. For instance an occupier of a premises is bound to take care and avoid injury to a child interfering with dangerous things in his premises if the child was an invitee or a licensee.

In *William* Vs. *Cardiff Corporation*, the defendant corporation allowed children to play, on a piece of waste land heaping the rubbish a child was injured due to traps on the ground. The corporation was held liable.

In *Glasgo corporation* Vs. *Taylor*, a child who entered a botonical garden open to public in general, kept by the defendant corporation, ate some poisionous berries in the garden and died. The corporation was held liable.

In *Banker* Vs. *Harbert*, a child who was passing by a road deviated from his way and entered into the garden of the defendant and was hurt there by climbing on a fence, the defendant was not held liable. If child is a tresspasser he cannot recover any damage.

Secondly, there must be a breach of duty on the part of the defendant. If the defendant did his duty to avoid the accident, he is not liable. In *Sychamore* Vs. *Lay* the defendant left his car on highway. A dog was confined in the car by a lash. The defendant while leaving the car warned the children including the plaintiff that if they went near car the dog may bite. The father of the child also warned the plaintiff not to go near the car. It was held that the plaintiff was not entitled to recover.

(b) The facts of the case are the same as those of *Harold* Vs. *Watney* (1898) 2 Q. B. 320 where the plaintiff, a child, was injured when he climbed rotten fence. It is not defence to say that the child himself was negligent, far negligence is but a state of mind and children have no sufficient mind to judge as quickly as an adult. Allowance is made for their weakness of judgment and inexperience. An infant can recover although its conduct contributed to the injury, if the defendant is shown to have failed in his duty to the infant.

In the present case the owner of the fence adjoining the highway was bound to take care and avaid injury to child interfering with the dangerous things in his premises. As he failed to do that he is liable and *B* will succeed.

(c) In the present case *A* is vicariously liable for the negligenee of *B* to the landlord. The liability of the master is absolute for the wrong done by his servant.

Q. 'A' a child aged four years, was crossing a road with his grandfather who was holding his hand. They had reached middle of the road when the grandfather was startled by the approrch of the defendant's car. The grandfather left child's hand and jumped to a place of safety. The child was struck down and injured by the negligence of the driver. Can 'A' succeed in the action against the car owner.

Ans. In *Waite* Vs. *North Eastern Railway* (1858) E. B. and E. 719, it was held that a child, in case there is contributory negligence on the part of the person, in whose charge he was at the time of the accident, cannot recover for injuries caused to him by the negligence of the defendant.

This view was not accepted in a later case where it was held that an infant or other person incapable of looking after himself is not precluded from recovering when injured by the negligence of the defendant, merely because the person in whose charge he was placed was guilty of contributory negligence.

In view of the above law regarding liability of defendant for negligence, it can safely be said that in present case the plaintiff, child aged under four, will succeed in an action against the defendant.

CHAPTER XX

CONSPIRACY

Q. Define Conspiracy. Illustrate with the leading cases that you know.

Ans. Conspiracy—According to Winfield, "When two or more persons, without lawful justification, combine, for the purpose of wilfully causing damage to the plaintiff, and actual damage results therefrom, they commit the tort of conspiracy.

Conspiracy as a tort must arise from a combination of two or more persons to do an act. It will be actionable if the 'real purpose of the combinations is the inflicting of the damage on *A* as distinguished from serving the bonafide and legitimate interest of those who so combine" and damage results.

The law regarding tortious liability has been in a state of confusion. The judgments delivered in (i) *Mogul Steamship Co.* Vs. *Mc Gregor Glow & Co.* (ii) *Allen* Vs. *Flood and Quinn* Vs. *Leathem*, created great difficulty and it was not easy to find a precise and concrete definition of conspiracy. But these cases have ceased from troubling since the decision in *Crafter Hand Woven Harris etc. Co.* Vs. *Veitch (1932) A. C. 436.*

In order to have a clear idea of tortious conspiracy the above cases are being considered in detail.

In *Mogul Steamship Co.* Vs. *Mc. Gregor Glow & Co.* the defendant and owner or ship-owner, combined to under bid the plaintiff's ship owner trading to the some ports, and, by reducing freights to an unremunerative level, to drive them out of trade.

If the defendant's object had been to injure the plaintiff, their combination would have been unlawful conspiracy, but as it was merely intended to protect their own trade interest it was lawful. Lord Morris observed "what one trader may do in respect of competition, a body or set of traders can lawful do, otherwise large capitalist could do what a number of small capitalist, combining together, could not do, and this blow would be struck at the very principle of co-operation and joint stock enterprise.

In *Allen* Vs. *Flood* (1898) A. C. I. the defendant, the delegate of an Iron workers trade union warned the employers of the plaintiff that unless they discharged him, as they were entitled to do at any time, the Iron workers would go on strike. The employers thereupon discharged the plaintiff and would re-engage him. The jury found that the defendant had acted maliciously in inducing the plaintiff's employers to discharge him but it was held that there was no cause of action. In this case the Court was dealing with an individual action and not the element of combination. The case is merely authority for the well established proposition that where the element of combination is absent, the motive of the defendant is immaterial, and the damage done intentionally and even malevolently to another gives no cause of action so long as no legal right of the other is infringed.

In *Sorrell* Vs. *Smith* (1925) A. C. 700 a newspaper combination threatened to cut off supply to a distributor unless he discontinued supply to a particular news vendor, the plaintiff. The combination acted as they did for the sole purpose of protection of their trade and were not actuated by spite or any desire to injure the plaintiff. It was held that they had not committed any actionable wrong with respect of conspiracy the House of Lords held "(i) A combination of two or more persons for the purpose of injuring a man in his trade is unlawful and, if it results in damage to him, is actionable." (2) If the real purpose of combination is not to injure another, but to forward or defend the trade of the combiners, no tort is committed, although damage to that other ensues provided the purpose is not effected by illegal means. The distinction between two classes of cases is sometimes expressed by saying that in cases of the former class there is not while in cases of the latter class there is just cause or the excuse for the action taken.

All this trouble was pacified in Crafts *Hand Woven Harris Tweed Co.* Vs. *Veitch* (1942) A. C. 435. In this case the production of *Harris Tweed* is an industry of Isle of Lewis. Originally the yarn of the cloth was hand spud from wool by the crafters of Lewis and was wholly produced in the Isle. By 19-0, spinning of wool had become commercially impracticable and thenceforth many of the weavers in Lewis imported yarn from the mainland. Five mill owners in Lewis nevertheless spun yarn woven by the crafters. These mill owner alleged that cloth was woven in Lewis it was therefore to their interest to get a minimum price fixed for the cloth of the work-people in their mills 90 percent were members of the Transport and General Works Union, and the Lewis dockers were also members of it. The Union with the object of securing that all mill workers should be members of the union, approached the mill owners, who replied that they could raise wages because of the crafters who wove yarn imported from the mainland. The Union officials, Makenzie and Veitch, then put up an embargo on the importation of yarn, by ordering the Lewis dockers not to handle yarn. The dockers obeyed (without breaking any contract) and thus injured the trade of seven small producers of tweed who used imported yarn and who sued Mackenzie and Veitch for conspiracy. The case did not involve any point under the Trade Dispute Act, 1906, for Mackenzie and Veitch were sued merely as individuals and not as officials of Trade Union.

It was held that there had been no actionable conspiracy. They noted as follows :—

(1) The first question that arose was whether Veitch and Mackenzie combined together "to injure" the appellants in the way of their trade, and that the appellants suffered damage from their illegal action. Conspiracy when regarded as crime, is the agreement of two or more persons to effect any unlawful purpose whether as their ultimate aim or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance it. The crime consists in agreement, though in most cases, overt acts done in pursuance of the combination are available to prove the fact of agreement. But the tort of conspiracy is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced.

(2) The appellants, therefore, in order to make out their case have to establish.

(a) agreement between the two respondents

(b) to effect unlawful purpose

(c) resulting in damage to the appellants

As regards (c) there can be no doubt. Instructing or persuading the dockers to handle imports of mainland spun yarn arriving for delivery to the appellants was an interference with the appellant's normal source of supply, which was bound to damage their business. Still more, perhaps, was it an injury to the appellants to prevent by these means the sending of their unfinished cloth to the mainland.

As regards (a) there was no difficulty. There was an agreement between two persons to do the thing complaind of.

The only difficulty in the case arises under (b) what exactly is meant in this branch of the law, by a combination to effect an unlawful purpose ? If *A* is damaged by the action of *B*, *A* nevertheless has no remedy against *B*, as *B*'s act is carried out without employing unlawful means. In such a case *A* has to endure *Demnum Obsque Injuria*. But if the act which damages *A* is not that of a single individual, but is due to a combination of two or more persons, then it is no longer possible to say that the motive or purpose is immaterial. If the real purpose of the combination is the inflicting of damage on *A* a distinguished from serving the *bonafide* and legitimate interest of those who so combine, then if damage results to *A* the act is tortious.

To this there is an exception where the defendant's real predominant purpose is to advance their own lawful interest in a matter in which they honestly belive that these interest would directly suffer if the action against the plaintiff was not taken.

In the present case the union had acted in furtherence of its own present interest and the interest of its members and therefore, the action failed. Viscount Sunon L. C., pointed out that purpose must be distinguised from motive. This action of conspiracy lies only where the predominant purpose of the defendant is to injure the plaintiff in his trade.

The essentials of actionable conspiracy deducible from the above cases may be summarised as follows :—

(1) A combination of two or more persons with the object of wilfully injuring another person.

(2) Inflicting of the injury.

(3) Consequent damage to the other person.

Exception—If the predominant object of the combination is to advance the legitimate interest of the combiners, this is not conspiracy.

CHAPTER XXI

NUISANCE

Q. (a) What is nuisance ? Distinguish between public nuisance and private nuisance.

(b) Can the same act be both a public and a private nuisance.

Ans. The word nuisance means an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegent or dainty moods and habits of living, but according to plain and sober, simple notions among the English people.

A public nuisance is an act which interferes with the enjoyment of right which all members of a community are entitled to such as the right to fresh air, to travel on the highway *etc*. The remedy for a public nuisance (which is a misdemeanour is by indictment information or injunction at the suit of the Attorney General and in certain cases by summary process, or abatement. If special damage is caused to an individual he has an action for damages or injunction against the wrongdoer.

A private nuisance is a tort consisting of (i) any wrongful disturbance of an easement or other servitude appurtenant to land, (2) the act of wrongfully causing or allowing the escape of deleterious thing into another person's land *e. g.* water, smoke smell, fumes, gas, noise, heat, vibrations, electricity, disease, germs, animals, and vegitation. Nuisance is commonly a continuing injury and is actionable only at the suit of the person in possession of the land injuriously affected by it : there must be actual damage to the plaintiff. The remedy for a private nuisance is either by abatement or by action for damages, injunction or mandamus. (OSBORN) In the case of *Ushaban Navinchandra Trivedi* Vs. *Bhagyalaxmi Chitramandir* [AIR(1978) Guj. 13] nuisance was defined as anything which is injurious to health or offending to the senses and which causes injury or damage or annoyance or discomfort to others. In order that nuisance is an actionable tort it is essential that there should exist (*i*) wrongful act (ii) damage or loss or inconvenience or annoyance caused to another.

Public nuisance and private nuisance sometimes overlap each other. Thus a public nuisance may also give a cause of action for private nuisance. In order that a private individual may have a private right of action in respect of a public nuisance he must show the following things :—

(i) a particular injury to himself beyond that which is suffered by the rest of the public. If the alleged nuisance is, for instance, the obstruction of a highway, it is not enough for him to show that he sufferes the same inconvenience in the use of the highway as other people do.

In *Municipal Board, Lucknow* Vs *Musammat Rama Devi* (1946) 16 Luck. 173, it was observed that the plaintiff must show that he has suffered some damage more than what the general body of the public had to suffer.

(ii) Such injury is direct and not a mere consequential injury as when one way is obstructed, but another is left open in such a case a private and particular injury is not sufficiently direct to give a cause of action.

(iii) The injury must be shown to be of a substantial character not fleeting or evanescent.

Thus in order to entitle a person to maintain an action for damages caused by that which a public nuisance, the damages must be particular, direct and substantial. The object of the rule is to avoid multiplicity of litigation.

In *Soltun* Vs. *De Held* (1851) the nuisance was regarding noise

The plaintiff resided in a house next to *Roman Catholic Chapel* of which the defendant was the priest and the chapel bell rung at all hours of day and night ; it was held that it was a public nuisance and was as much as it proved particularly abonxioas to the plaintiff and satisfied the requirement above laid down, it become so far as the plaintiff is concerned, a private nuisance and the plaintiff was entitled to injunction.

Problems

Q. 'A' lives in a house with his family. The house is situated in a good locality. In the same locality and adjoining to 'A' s' house 'B' uses a house for the purpose of prostitution. This 'B' does inside his house. Decide.

Ans. *A* can bring an action against *B* and obtain the injuction orders. The prostitution amounts to interference with the peaceful life of *A*.

In *Thompson-Schwa and Another* Vs. *Costaki and Another* (1956) All E. D. 652, each of the plaintiff occupied a dwelling house as his residence together with his family in a good class residential street in London. In the same street a house (adjoining to the plantiff and near to that of the second plaintiff) was used by the defendants for the purpose of prostitution, their practice being the solicit men in nearly streets and bring them to the house. The plaintiffs brought an action to restrain the defendant from using the house for the purpose of prostitution, and they obtained an interlocutory injunction restraining the defendant. Until after judgment in this action or until further orders whether themselves or by their servants or agents or any of them or otherwise by law howsoever from using or causing or permitting to be used (the house) for the purpose of prostitution."

The defendant appealed. It was held that the plaintiff had shown a sufficient *prima facie* case for an interlocutory injunction in that the activities of the defendants constituted a sensible interference with the comfortable and conveinent enjoyment of the plaintiff residence, having regard to the usage of civilised society and to the character of the neighbourhood.

It was observed that "It is impossible to give any precise or universal formula, but it may be broadly said that a useful test is perhaps what is reasonable according to the ordinary usage of mankind living in society, or more correctly in a particular society. The forms which nuisance may take are protean."

Q. Discuss with illustrations the essential elements of nuisance. (L. U. 1978).

Ans. The following are the essential elements of Nuisance :—

(1) Interference with the use and enjoyment of land or some right over it.

(2) The plaintiffs title to the things with which interference takes place.

(3) Resultant damage.

We now take these elements one by one:–

1. **Interference**—A nuisance is essentially an interference with the right of use and enjoyment of land with results in damage to the paintiff. The damage may be in any of the two forms *viz.* (1) Interference causing damage to the property or (2) interference with personal comfort. It may endanger health safety or comfort of the public generally such as noise, escape of noxious vapours, gases, fumes, or any deleterious thing affecting the health of the people.

In *St. Helens Smelting Co.* Vs. *Tripping*, 35 L. I. Q. B. 66 the appellant carried on smelting work in the neighbourhood. The respondent bought an estate there, and the noxious fumes from the works injured his trees, plants and cattle. Damages were awarded. The court drew a distinction between nuisances producing material injury to property and those producing personal comfort or inconveniences. With regard to the latter namely, the personal inconvenience, it is relevant to enquire circumstances of the place where the thing complained of actually occurs. "If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce and for the benefit of inhabitants of the town and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which carried on in a reasonable and fair way, he has no ground of complaint because, to himself individually, there may arise much comfort from the trade carried on in that shop. But when an occupation is carried on by one person in he neighbourhood of another, and the result of that trade or occupation or business is material injury to property, then unquestionably arises a very different consideration. I think in case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

Further, in considering what is reasonable interference the low does not take into account abnormal sensitiveness in either person or property. "If the only reason why a man complains of fumes is that he has an unusally sensitive nose or that he owns an exotic power, he cannot except any sympathy from the court.

The things affected—Private nuisance consists of injuries to property, whether to easement such as the obstruction of light or rights way, or the diversion of water courses or the withdrawal of support from a house or to other kinds of property, as by noise, noxious vapours, smoke or the like. In all such cases the plaintiff in order to maintain action, must show some title to the thing to which the nuisance alleged to be. Thus the person in actual possession of the land can sue but a lodger or a guest of an occupier or any other person who is merely present on the premises or the servant of the occupier cannot sue.

Q. (a) 'A' had an electrical power station near a church The power station makes noise. The trustees of the church feel disturbance. There was no personal annoyance except the priest. Can he sue 'A' for nuisance ?

(b) 'B' has been manufacturing paper boxes in the cellar a of, house the upper part of which was in the occupation of 'A'. 'B's business required hot and dry air and he heats the cellar accordingly. This diminishes the value of brown paper which 'A' collected there ? It does not inconvenient 'A'. Decide.

Ans—(a) For determining whether there has been nuisance the most important test is whether there has been interference in the personal comfort is that of reasonableness. But in considering what is reasonable, it ignores abnormal sensitiveness in either person or property. When a person feels inconvenience because of his over sensitiveness to any kind of nuisance he cannot maintain an action against the person who creates nuisance.

In view of the above rule the trustees of the church cannot obtain injunction against *A*. There is no personal annoyance to any one except the trustees who are oversensitive. Hence the action will fail.

In *Heath* Vs. *Brightom Mayor of*, (1908) L. T. 718 the incumbent and trustees of a Brighton church sought an injunction to restrain noise from the defendant's electrical power station. There was no proof of the diminution of congregation or of any personal annoyance to anyone except the incumbent and he was not prevented from preaching or conducting his services, nor was the noise such as to distract the attention of ordinary healthy persons attending the church. An injunction was not granted.

(b) When a man carries on an extremely delicate trade be cannot complain of the loss done to him by the lawful job of other person.

In this case *B* has been doing his business lawfully. *A* himself does not feel any inconvenience except that the value of the brown paper collected by him diminished. This shows delicate business of *A*. *A* cannot be granted injuction.

In *Robinson* Vs. *Kilvert* (1889) 41 Ch. D. 88 the defendant began to manufacture paper boxes in the cellar of a house, upper part of which was in the occupation of the plaintiff. The defendent's business required hot and dry air and he heated the cellar accordingly. This raised the temperature on the plaintiff's floor and dried and diminished the value of brown paper which the plaintiff kept there ; but it did not inconvenience the plaintiff's workmen nor would it have injured paper generally. It was held that the defendant was not liable for nuisance.

Lapes L. J. said "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade."

Q. 'A' a sugar vendor, sells sugar which is a rationed article on a public street. Large crowds of people assemble around the shop and cause obstruction of the highway. Is it a nuisance to the highway.

Ans. No. *A* is not liable for obstruction of the highway because he is making only ordinary use of his premises. The crowd assembled on the highway was not due to anything unreasonable being done by the shopkeeper.

Q. A has piled up large quantity of brick and sand near the shop of B on a pavement with the result that B's customers become unable to reach B's shop. Is A liable for nuisance.

Ans. In this case *A* will be liable to *B* for nuisance. Although it is true that every obstruction is not nuisance but in this case *B* suffers a special harm and is therefore liable to *B*.

Q. A lamp is projected over the pavement from A's house. B who was passing through the roadside pavement was injured by the falling of the lamp. On enquiry it was found that the attachment of the lamp was weak and decayed of which A had full knowledge.

Ans. Because *A* know the condition of the attachment he would be liable to *B* for the injury sustained by him, It is notworthy that in cases like lamps and signboards *etc*. The owners of these are expected to exercise great care because slightest negligence in respect of these can cause serious injuries (sometimes even death) to the passers by. [*Tarry* Vs. *Ashton* (1876) I. Q. B. D. 314].

Q. (i) 'A' is a music teacher and his constant giving of music lesson annoys 'B'. a neighbour. By way of retaliation when the music lesson starts 'B' deliberately creates a great deal of noise by knocking on the partition wall, beating on trays, whistling and shricking.

(ii) 'A' and 'B' are owners of separate but contiguous lands. 'A' has a tank on his own land on which there are wild ducks. 'B' frequently goes to the edge of his own land and out of hatred fires gun which scares the ducks and they fly away.

Can 'B' be held liable for nuisance ?

Ans. The rule is that acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance. In nuisance sometimes malice renders an ; act unreasonable.

In this case *B* deliberately creates noise. This he does out of malice and in order to causes annoyance to music teacher and his taught. This act of *B* actually causes annoyance to his neighbour who has been doing his act lawfully and without any ill will against *B* who retaliated by interfering with *A*'s right. *B* shall be liable for damages.

In *Christie* Vs. *Devy* (1893) 1 Ch. 316, the defendant tired by a considerable amount of music lessons given by the plaintiff, a teacher of music whose residence was separated from that of the defendant only by a partition wall, interrupted the plaintiff's lesson by knocking on the partition wall, beating on trays, whistling and shricking. An injunction was granted because the act was done maliciously for the purpose of annoying the plaintiff.

(b) The rule is that evil motive may, in some circumstances, made on otherwise innocent use of land, be a nuisance.

In this case *B* fires gun due to malice. The firing of gun scares the ducks which fly away. This Act of *B* would amount to nuisance and he shall be liable for damages.

In *Hollywood Silver Fox Farm* Vs. *Emett*, (1936) 2 K. B. 468, the plaintiff company who carried on the business of breeding silver foxes on a farm adjoining to the defendant's land, erected on their land a notice board inscribed "Hollywood Silver Fox Farm". The defendant from whose land the notice was visible, objected to its erection, and requested the company to remove it, threatening that, if that were not done, he would shoot with black powder on his land during the breeding season as near as possible to the breeding dens." The defendant carried on this threat and caused guns to be fired on his field close to the plaintiff's land with the result that some vixen failed to mate and one ate her cubs. It was held that the plaintiff was to get damages.

Q. Distinguish Trespass to land from Nuisance.

A tree growing in the compound of 'A' is overhanging the compound of 'B', and casts of deep shadows over the plants of 'B' and prevents their proper growth. What kind of action has 'B' against 'A' ? Consider cause of whether 'B' can cut off the branches and, if so, when ?

Ans. **Trespass to land and Nuisance**—There are two views about the relation between nuisance and trespass to land. According to one view these two may possibly concide *i. e.*, some king of nuisance is also a trespass to land. Another view is that they are mutually exclusive. Authority indicates that trespass and not nuisance is the right action for continuing trespass.

In *Holmes Vs. Wilson* (1839) 10 A & E 503 highway authorities supported a road by wrongfully building buttress on plaintiff's land and they paid full compensation for trespass. They were nevertheless held liable in a further action for trespass because they had not removed the buttresses. Further it has no importance now and he can combine trespass and nuisance if he is in doubt. In *South Part Corporation* Vs. *Esso Petroleum Co. Ltd.*, the plaintiff sued the defendant on the ground of nuisance, negligence and *res ipsa loquitor* was made applicable.

Winfield gives two practical differences between trespass and nuisance. They are :

(i) Trepass is a wrong to possession, while nuisance is not limited to this.

(ii) In trespass damage need not be proved, in nuisance of certain kind, it must be.

B can bring an action against *A* for nuisance. In priv ate nuisance, the acts constituting the nuisance are not-necessarily usually unlawful. It is caused by a person on his own land and consequences of his acts are not confined to his land but extend to the land of his neighbour. In the present case the tree is grown in the compound of *A* but its branches overhang the compound of *B* thereby doing damage to *B*'s vegetable. Hence *A* shall be liable for nuisance.

One of the remedy for nuisance is abatement. Abatement implies removal of nuisance by the party injured without recourse to legal proceedings. In the case of omission notice is necessary except where branches of trees are overhanging one's property are to be out. In the present case *B* can cut off the branches of tres without giving any notice to *A*.

Q. (a) 'A' was prevented by 'B's' obstruction of the highway from using the way for casting coal from his colliery, and the cost was deteriorated by the delay.

(b) 'A' is prevented from witnessing a procession from his window by a stand erected by 'B' on the highway.

Ans. (i) It is a public, nuisance if anybody obstructs the highway and one, who suffers damage on account of that obstruction, has got a right to maintain an action. In the present case *B*'s obstruction to the highway as a result of which *A* sustained loss. *B* shall be liable for nuisance.

In *Iveson* Vs. *Moore* where the plaintiff was prevented by the defendant's obstruction of the highway from using the way for casting coal from his colliery and the coal was deteriorated by the delay, the special damage was held sufficient to support the action.

(ii) It amounts to nuisance if any erection on the highway prevents an occupier to view highway from his windows. It is an interference with his right to witness what is happening on the highway. In the present case *B*'s erection prevents *A* from witnessing a procession on the highway. *B* shall be liable for nuisance.

In *Compbell* Vs. *Corporation of Paddington*, (1911) I. K. B. 869, the occupier of a premises abuting on a highway was held to have good cause of action for the wrongful erection in the highway of a stand which obstructed the view of highway from her windows and so prevented her from her windows for the use of her premises for viewing Edward VII's funeral procession.

Q. Lucknow Corporation gave contract to 'A' for repairing roads. 'B' left heap of soil unlighted at night. 'B',a cyclist, dashed against soil and was injured. Discuss the liability of Corporation.

Ans. The rule is that any one who creates danger on the highway and another person suffers injury on account of that another man has got a right to recover damages. The public has right to walk on highway without any danger.

In the present case the contractor was employed by the Corporation. The negligent act of *A* resulted in injury to cyclist, B. The Corporation shall be liable for nuisance.

In *Penny* Vs. *Wimbledon Urban Council* (1899) 2 Q. B. 72, the Council thought acting in the exercise of statutory powers was held liable for negligence of a contractor who was employed by them to repair a road, who left there a heap of soil unlighted at night to the injury of a passenger.

In *Holliday* Vs. *National Telephone Co.* (1899) I.Q.B. 221 where owing to the negligence of a plumber employed as an independent contractor good work in a public street molten solder was scattered by the explosion of a benjoline lamp, the defendants were held liable.

Q. A branch of a tree growing on 'A's' land overhangs the highway. The tree is healthy. It all of a sudden breaks and falls upon 'Y's' motor car passing along the highway.

(ii) A lamp projects over the pavement from the house of 'A' The attachment of the lamp to its braket is in a decayed condition. It falls down upon 'B' as he was passing on the pavement causing injury to his face.

Consider the above cases and say whether they are actionable for nuisance on highway.

Ans. (i) In this case *A* is not liable. The mere fact that a tree overhangs a highway cannot make it a nuisance. If it were otherwise then it would seem that every lamp, so overhanging, every sign board, every lock are in themselves illegal erections, not to mention the upper stories corbetted out over the roadways which are common in every town. The right of the public in a highway is merely to pass and repass and so long as that right is not interfered with they cannot complain of what is in the air or on the earth beneath.

Further *A* was not aware of the weakness of the tree. The rule is that a person is liable for a nuisance constituted by the state of his property.

(a) if he causes ;

(b) if by the neglect of some duty he allows it to arise, and

(c) if, when it has arisen without his own act or default, omits to remedy it within a reasonable time after he did or ought to have become aware of it. In this case none of these rules apply.

(ii) The rule is that where a heavy object is suspended over a highway, and must fall into it unless supported by artificial means which can only be kept in order by the person in possession of the premises. such person is bound absolutely to maintain the attachment. In this case it is obligatory for *A* to ensure that the lamp so overhanging does no fall down and cause injury to a passerby. *B* is injured due to the fall of lamp and, as such *A* shall be liable.

In *Harry* Vs. *Ashton* (1876) I. Q. B. D. 314 a lamp attached to the defendant's permises overhung the highway, and it was held he that he was bound to prevent it from falling at his peril.

Q. What is the liability of landlord :

(i) When he authorises his tenant to create or continue nuisance.

(ii) When he lets premises with nuisance on them.

Ans. Liability of landlord when he authorises his tenant create or continue nuisance—The landlord is liable who impliedly or expressly authorises his tenant to create or continue nuisance.

In *Harris* Vs. *James* (1876) 45 L. I. Q. 13545 where *A* lets a field to *B* for working it as a lime quarry *B*'s act in blasting the lime stone and letting smoke escape from the kins constituted a nuisance to *C*. *A*. was held liable for *B*'s method of working . the quarry as the usual way of getting lime and *A* was taken to have authorised it. Here the liability of *A* is in the same sense as principal liability for the act of his agent authorised by him.

(ii) Liability of landlord who lets premises with nuisance on them—A landlord is also liable when the nuisance existed at time of the commencement of the tenancy and was not or ought to have been known by the landlord to exist, and the premises were let without any covenant on the part of the tenant to repair or otherwise discontinue or Prevent the nuisance.

In *Todd* Vs. *Flight* where the defendant had at the time of lettining his premises allowed the chimney to be in such dilapidated condition, that it fell on adjoining property of the plaintiff. He was held liable.

Q. (a) 'Y', a lady was injured by slipping through a defective iron grating over the area of a house in the occupation of 'X'. 'Y' sued the landlord 'A' who has let the premises to 'X'. Is 'A' liable ?

(b) 'A' a builder of house on 'X' land obstructed 'X's' access to a private market. Is 'A' liable.

Ans. (a) A landlord is liable when there is defect on the date of letting. Since there was no dafect in the grating on day on letting *A* shall not be liable.

Gangly Vs. *Jubber* (1865) 5 *B* and *S* 78, the plaintiff was lamed by slipping through a defective iron grating over the area of a house in the occupation of *X*. She sued the defendant, who had originally let the premises to *X*. The court was of the opinion that there was no tenancy between the defendant and *X* and it was held that even if there were one, the defendant was not liable because it was not alleged that the grating was defective at the time of letting.

(b) He who creates nuisance is liable for it. It does not matter, whether the person is the owner, stranger or occupier of that premises.

In the above cases *A* created nuisance by obstructing *Y*'s access to his shop, and, as such, *A* shall be liable.

Q. (i) 'X' let out house to 'Y'. The house has a defective shutter and 'X' and 'Y' are aware of the defect. 'A' while walking along the highway is injured by the fall of defective shutter. Discuss the liability of 'X' and 'Y'.

(ii) 'X' lets out his house to 'B'. The lease provides that 'B' is liable for repairs and that 'X' may have access at all times to see that repairs have been done. In case 'B' does not make necessary repairs, 'X' may make repairs himself. 'Y' a passerby, is injured by the fall of bricks. Is 'X' liable ?

Ans. (i) Generally landlord is liable for the nuisance created on the permises let out by him. But the liability of tenant is also not excluded. When tenant is aware of the defect and the lease does not provide for the responsibility of the repairs of the premises of which he is in occupations the tenant shall he liable for nuisance.

In the present case *Y* was also aware of the defect in shutter. Had he taken care to repair the shutter, injury to *A* could have been prevented. Since nor repair was done either by *X* or *Y* both shall be liable for nuisance.

In *Wilckick* Vs. *Marks* (1934) 2 K. B. 56 the plaintiff was walking along the highway when she was injured by the fall of a defective shutter from *X*'s house. *X* had let the house to *Y* and both *X* and *Y* knew of the defect. There was no covenant on either side to repair. Both were liable.

(ii) The landlord *X* is liable because he had a right of access to do repairs himself and when *X* did not exercise his right to prevent accidents he is liable for the injury caused to the passerby.

Q. (a) State precisely the duty of an occupier of premises to a trespasser.

(b) 'B' has a noisy printing press adjoining a piece of vacant land. 'A' buys the land and builds a house upon it. Can 'A' sue 'B' for nuisance by noise even though he knew of the noise before he bought the land ? Decide.

Ans. (a) If she nuisance is created by the trespasser the occupier is liable if he continues it or adopts it.

In *Sedleigh Denfield* Vs. *O. Callaghan* (1940) A.I. 880 the *X* society were owner and occupies of a ditch, part of which bordered on *Y*'s land. A tresspasser inserted in the ditch an obstruction. *Z*, the agent of *X* society became aware of the obstruction, but did not inform the society. About three years later, a heavy rainfall combined with obstruction caused an overflow of the ditch which flooded *Y*'s land. *Y* sued the *X* society for nuisance.

Branson J. dismissed the action and gave judgment for *X* society. The court of Appeal affirmed the decision. The House of Lords unanimously and in a considerate judgment reversed the Court of Appeal's judgment and held the society liable.

It was held that respondent continued and adopted the nuisance. After the lapse of nearly three years they must be taken to have suffered the nuisance to continue ; for they neglected to take very simple step of placing a grid in the proper place which would have removed the danger to their neighbour's land. They adopted the nuisance for they continued during all that time to use the artificial contrivance of the conduct for the purpose of getting rid of water from their property without taking the proper means for rendering it safe.

The principle laid down "an occupier is not *prima facie* responsible for a nuisance created without his knowledge and consent." If he is to be liable a further condition is necessary, namely that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constituted a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made, as it were, when he acquired the property for the nuisance may be due to the latent defect or to the act of trespasser or stranger. Then he is not liable unless he continued or adopted the nuisance or, more accurately, did not without undue delay remedy it when he became aware of it or with ordinary and responsible care should have become a aware of it.

"The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of nuisance. It should extend to his conduct if with knowledge he leaves the nuisance on his land."

(b) It is established law that it is no defence that the plaintiff himself came to the nuisance and that it does not prevent him from recovering damages or an injunction.

In the present case *A* buys vacant land near a noisy printing press. It is true that *A* went there himself, but *B* cannot plead that *A* himself came to the place of nuisance, and, as such, he cannot recover damages. *A* can successfully bring an action for nuisance.

In *Bliss* Vs. *Hall* (1838) 4 Bing N.C. 183, the defendant had set up a tallow chandlery which emitted "diverse, noisome, noxious and offensive vapours, fumes, smells and stenches" to the discomfort of the plaintiff, who had taken a house near it. It was held to be no defence that the business had been in existence for three years before the plaintiff's arrival, for he, "came to the house—with all the rights which the common law affords, and one of them is a right to wholesome air." But if a man chooses to make his home in the heart of a coalfield or in a manufacturing district, he can expect nowhere freedom from the discomfort usually associated with such a place than any other resident can.

Q. (a) What amounts to nuisance on highway ?

(b) During a cricket match a batsman hit a ball which struck and injured the plaintiff who was standing on highway adjoining the ground. There was a protective fence rising to 17 ft. above the cricket pitch. The distance from the striker to the fence was about 100 yards. There was evidence that on six occassions in a period of thirty-five years, a ball had been hit into the highway but no one had been injured. The plaintiff elaims damages from the defendant as occupier of the ground. Advise the plaintiff.

Ans. (i) Nuisance to a highway consists in the following :—

(1) (a) Nuisance on the highway—It is a public nuisance if any body obstructs the highway and one, who suffers damage, on account of that obstruction, has got a right to maintain an action.

In *Maynell* Vs. *Salt Margh* (1955) 1 Kebb 847 where the plaintiff was prevented by the defendant's obstruction from carrying his corn, whereby the corn was damaged by the rain, the defendant was held liable.

Similarly in *Wilkes* Vs. *Hunger Ford Market Co*. (1835), 2 Bing N. C. 281 the access to the plaintiff's threatre was obstructed by the formation of a que in front of the premises. It was held that the action could lie.

(2) Creation of danger in highway—Any one who creates a danger in highway another person suffers injury on account of that danger that another man has got a right to recover damages. The danger may be created by digging a trench across it placing a log or pile of stones in the middle of it.

A thing may be nuisance in the highway even though it does not prevent or impede the flow of traffic or the passage of pedestrian. For example a small heap of slates left in the gutter near the Kerb by the repaires of property for collection was held to be a nuisance so that a pedestrian who tripped over it recovered damages.

(3) Misfeasance and non-feasance—Wheu a nuisance arises not from non-feasance but from misfeasance on the part of the highway authority an action for special damages flowing from nuisance will lie. If a highway authority leaves a road done and it gets out of repair, there is of course, no doubts that no action can be brought, although damage ensues.

"This doctrine will not apply where the road authority has done something made up or altered or diverted a highway and have omitted some precaution, which if taken would have made the work done safe instead of dangerous". In *Thompson* Vs. *Mayor of Brighton* (1894) I. D. B. 332, the plaintiff was riding along a public road and his horse's foot struck the cover of an entrance to a sewer, whereby the horse was thrown down and injured. The cover was in perfect order, but projected an inch or so above the surface of the road owing to the wearing away of the latter. The defendants were held not liable on the ground that the cause of the accident was a mere omission to repair the road.

In *Shore Ditch* (*Mayor of*) Vs. *Bull* (1904) 90 L. T. 210 where *X* was both sanitary and road authority and dug a trench in the highway for the purpose of lying a sewer but filled it up imperfectly on one side of the road. The plaintiff driving his cab by night crossed to the other side of the road in order to avoid this unsafe part and ran into a heap of rubbish. It had been placed by some trespasser but *X* knew of its existence and had not lighted or fenced it. *X* was held liable, his conduct was misfeasance.

(4) Projection over a highway—If the damage is done due to the collapse of projection on the highway or by some other mischief traceable to it, the occupier of the premises on which it stood is liable if he knew of the defect or ought, on investigation, to have known of it. This is the rule with respect to a thing that is naturally on the premises.

In *Noble* Vs. *Harrison* (1926) 2 K. B. 322 a branch of a tree growing on defendant's land overhung the highway, and in fine weather suddenly broke and fell upon the plaintiff's vehicle as it passed along the highway. Neither the defendant nor his servants knew that the branch was dangerous and the fracture was due to a hidden defect which was not discoverable by any reasonable careful inspection. The defendant was not held liable.

(b) The plaintiff cannot claim damages from the defendant, as an occupier. The ball crossed the fence six times on last occasion but no one was injured. This time the plaintiff was injured. There was no continuity. Nuisance is a State affair, it may be temporary. The defendant cannot be held liable for the isolated case of injury from the act which has been done there for the last 99 years.

Q. What are the possible defences in an action for nuisance ? Discuss briefly.

Ans. The following are the possible defences in an action for nuisance. These defences can be broadly placed into three categories namely :—

(i) Good defences—Among the good defences (i) Statutory authority, (ii) Lawful user, (iii) Triffling damages are the main. Now we discuss these defences one by one:—

(i) **Statutory authority**—This means that the defendant can defend his case by saying that the nuisance complained of is an interference with a right or rights of the plaintiff which the law permits. For example if the plaintiff brings an action against a factory owner that the noise caused by the machinery of his mill causes disturbance to the plaintiff and that due to the noise he is unable to get sound sleep in the night. In such a case the defendant can plead that the noise coming out of the machinery of the mill is permitted by a statute *i. e.* Factory Act. In the case of *Syed muzaffar Husain* Vs. *Administrator of the Lahore municipality* it was held that people reseding in an industrial locality cannot get the same amenities as, those living in a purely residential locality.

(ii) **Lawful user**—The second defence can be that the nuisance complained of is not in fact a nuisance but it is an outcome of lawful user of the property by the defendant.

(iii) **Triffling damage**—If that damage caused to the defendant is too small or triffling it can be a good defence argument. The defendant can say that the damage caused to the plaintiff is too triffling.

(i) **Coming to nuisance is no defence**—It is now settled that it is no defence that plaintiff himself came to the nuisance. This defence cannot prevent the plaintiff from recovering damages. For example *A*, a plaintiff, purchases a house a noisy printing press of *B*. In an action for nuisance by *A*, *B* cannot take the defence, that *A* himself came near to the press and as such *A* is not entitled for damages.

(ii) **Nuisance in a suitable place no defence**—It is no defence that the business or the activing rise to nuisance is carried on at a suitable place.

In *St. Helen's Smelting Co. Vs. Tipping Works* erected by the appellants emitted noxious fumes which injured the vegetation of the respoudent's country estate and the animal on it. The House of Lords gave the judgment for the respondent, and the appeal was dismissed with costs.

(iii) It is no difence that it is done by independent acts of different persons.

Many—It is no defence to say that the act of the defendant by itself is not a nuisance and it becomes nuisance only where the act is combined with that of other two rival proprietors of merry go-rounds, each of which had an organ, carried on their business near the plaintiff's house, and injunction was granted' Chitty, J. saying "If the acts of two persons, each being aware of what other is doing' amount in the aggregate to what is an actionable wrong, each is amendable to the remedy against the aggregate cause of complaint." This is the law even where the act of one of them is enough of itself to amount to an actionable wrong the other in that event being also liable, although his share of damages will be less.

(vi) **Usefulness not in itself a defence** - It is also no defence that the trade of business is beneficial to the public at large although it is nuisance to the plaintiff. In *Admas* Vs. *Urselt* 150 a fried fish shop was shown to serve a useful purpose in supplying good food to poor people, but it was so carried on as to be nuisance to the occupier of the neighbouring property that injunction to restrain the use of the shop for the puapose was granted.

In the end it may be added that private nuisance is legalised by prescription.

Q. When do you think that a landlord is liable for nuisance on premises let by him to a tenant ?

Ans—It is a general principle of law that it is the occupier who is liable for a nuisance. In the following cases, however, the landlord will also be held liable :—

(1) When the landlord has, prior to the base, created a nuisance or knew or ought to have known the nuisance.

(2) When the nuisance has arisen due to a breach by the landlord of his own covenants to do repairs. This may be illustrated by an example. Suppose, *A* lets his house to *B*. The base provides that *B* is liable for repairs and that *A* may have access at all time to see that repairs have been properly done. In case *B* does make necessary repairs *A* may make repairs himself. *Y*, a passer-by, is injured by the fall of a brick on his head. Is *A* liable ?

In this case *A* would be liable because he had a right of access to do repairs himself and when *A* did not exercise his right to prevent accidents, he is liable for the damage caused to the passer-by, *Y*.

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CHAPTER XXII

STRICT LIABILITY

Q. Discuss the rule in Rylands Vs. Flelcher (1865) 3 'H' and 'C', adverting to the facts of the case. State whether the rule is applicable in India ?

Ans. Rylands Vs. Fletcher : Facts—The defendants, owners of the water mill, wishing to have a reservoir built on their land, engaged an engineer and contractor to carry out the job. In the course of the work the contractor came upon some old shafts and passages on the defendant's land. They communicated with the mines of the plaintiff, a neighbour of defendant. These shafts were filled with marsh and earth and so were not apparent. Where the reservoir was constructed the water broke through the shafts, ran along with passages and flooded the plaintiff's mine. The defendants were held liable even though there was no negligence on their part. "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at this peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. "He can excuse himself by showing that the escape was the consequence of *vis major* or the act of God, but as nothing of that sort exists here, it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seems on principles just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour's or whose field is flooded by the water from his neighbour's reservoir, as whose cellar is invaded by the filth of his neighbour's privy, as whose habitation is made uuhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour, who has brought something on his own property, which was not naturally there harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accured, and it seems, but just that he should at his peril keep it there so and anticipated consequences. And upon authority, this we think is established to be the law whether the things so bought be beast or water or filth or strenches.

We have seen that the basis of the liability in nuisance is the unreasonable user of land. Liability under *Rylands* Vs. *Fletcher* is based on the non-natural user of land. The rule just stated has been applied in a variety of things. The widening scope of this variety is thus stated by *Lord Wright* in "North Western Utilities Cases." The rule is not limited to case where the defendant has been carrying or accumulating the dangerous thing on his own land ; it applies equally in the case like the present where the appellants were carrying the gas in mines laid in the property of the city (that is, in the subsoil) in exercise of franchise to do so. "Other thing which have been included in the rule as gas, explosions, electricity, oil, noxious fumes, colliery spoil, rusty wire from a decayed fence vibrations positions, vegetation, a flag pole and chair-o-plane." (Winfield P. 470).

Q. What are the exception to the rule in Rylands Vs. Fletcher ?

Ans. Exception to the Rule in Rylands Vs. Fletcher—The rule in *Rylands* Vs. *Fletcher* does not apply in the following cases :—

(i) Damage due to natural user of the land—If the land is used in its natural way and damage is caused to the plaintiff, the defendant is not liable. The loss resulting from the natural use of land does not make the defendant to pay damages.

If a conducts a mining operation on his own land in such a way as to cause water to flood his neighbour's mine and the inundation is due to mere gravitation, he is not liable.

Sometimes it becomes difficult to ascertion as to what is the natrual and non-natural use of land. Broadly speaking growing ordinary non-poisonus trees, erecting houses, bringing gas, electricity or water on land for the purpose of domestic use are examples of natural use of land.

It may, however, be submitted that the test whether a particular use "natural" or "non-natural" must not be guided by certain hard and fast rule but they should be subject to change with the changing economic and social conditions of different places.

(ii) Things not Essentially Dangerous—The phrase "essentially dangerous" has also been subject of great confusion as a particular safe thing *e. g.*, chair may be safe for all purposes but if it has rotten leg, it might become dangerous and similarly obviously dangerous things, *e. g.*, a gun may become non-dangerous thing if it is unloaded or defective.

The rule in *Rylands* Vs. *Fletcher* applies only to the things which are brought and collected on the land. The rule does not apply to the things which are naturally there on the land.

In *Ciles* Vs. *Walker* (1890) 24 Q. E. D. 656 it was held that the occupier of land is not bound to prevent the growth of thistle on it and the consequent speed of thistle down to the land of his neighbour.

In *Crownburst Amersdian Burial Board* (1878) 4 ex. D 5, the defendant planted two yew trees about four feet within their boundary railings. The trees were not naturally on the land ; and they were poisonous in nature and were overhanging on his neighbour's land. The neighbour's horse are the leaves and was poisoned for which person who planted the trees was liable.

Another question arises whether the occupier is liable for animals which he has not himself brought there. In *Bland* Vs. *Yates* injunction was granted against the defendant who used an excessive quantity of manure in which flies bred.

This second exception is applicable in case of water also. Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land at a lower level cannot complain of water naturally flowing or percolating to his land from a higher level.

In *Nield* Vs. *London and North Western Rly.* (1874) L. R, 10 Ex. 4 where the defendants to protect their premises built a barricade of planks against flood water, which being penned back, flooded the plaintiff's premises, the defendants were held not liable. Bramwell *B*, observed, "The law allows what I may term a kind of reasonable selfishness in such matters ; it says let everyone look for himself and protect his own interest."

(iii) Consent of the plaintiff—*Rylands* Vs. *Fletcher* is not applicable where the plaintiff himself consents to the dangerous things being brought to the dangerous place from which it may cause injury. In such a case the defendant is not liable except for negligence. The exception merely states the general defence of *voleuti non fit injuria*. This means where there is consent there is no injury.

(iv) Common Benefit—Where the source of danger is kept for the common benefit of both plaintiff and defendant, the rule of strict liability is not applicable and the defendant would not be liable.

In *Carstairs* Vs. *Tylor* (1871) L. R. 6 Ex. 217 the defendant was held not responsible for an escape of water from his tank through a whole made in it by a rat. The negligence on the part of defendant was not proved.

(v) Act of Stranger—If the harm caused is due to an act of stranger, the rule is not applicable. Where *B*, a trespasser, lights a fire in *A*'s land *A* is not liable, if it burns *A*'s neighbour's property unless *A* has failed to extinguish it within reasonable time.

In *Box* Vs. *Jubb* (1879) 4 Ex. 76, the defendants were not responsible for the damage done through an overflow of their resevoir into the stream which fed that of the defendant Kelley, *C. B.* said, "The matters complained of took place through no default or breach of duty of the defendants, but were caused by the stranger over whom and a spot where they had no control."

In *Richards* Vs. *Lothian* (1913) A. C. 263, some malicious third person blocked up the waste pipe of lavatory basin on *X*'s premises and thereby the premiss of *Y* were flooded. The questions was whether *X* was liable to *Y*. The judicial committee held that *X* was not liable.

In *Perry* Vs. *Kendricks Transport Ltd.* (1956) All. E. R. 154, the defendants were garage and coach proprietors. They owned and occupied a garage. Adjacent to it was vehicle park sorrounded on the east and west by waste land and on the south by a low wall on the south. *A* motor coach which was not in use was parked in the south west corner of the vehicle park. The defendant had removed the petrol from its tank and had replaced the screw petrol cap, which as the coach stood, was alongside the bank. The defendants regularly inspected the vehicle park and the vehicle therein, and they did all that they could to turn children away from the vehicle park.

On October 29, 1952, the infant plaintiff was crossing the waste land and approaching two boys aged about ten years, who were standing on the bank of the coach. As he came near, the boys jumped back, and there was an explosion from which the plaintiff suffered injuries. In an action for damages for personal injuries against the defendents, it was found that the cap of the petrol tank had been removed and that one of the two boys had thrown a lighted match into the petrol tank.

It was held that the defendants were not liable under the rule in *Rylands* Vs. *Fletcher* as they were within an exception to that rule, since the acts which brought about the explosion were the acts of stranger over whom the defendant had no control and *Richard* Vs. *Lothian* was applied.

It was also held that the defendants were not liable in negligence. *Jankins* L. J. said that if the facts are such as to show that the dangerous thing left by the defendants in such a condition that it was reasonable and probable consequence of their action, which they ought to have foreseen, the children might middle with the dangerous thing and cause it to escape, than the defendant could not maintain but here the mischievous acts of the children constituted the acts of strangers.

(vi) Statutory Authority—The rule is also not applicable where the defendant acted in persuance of some special statutory authority in placing a dangerous thing on the land from which it escaped.

In *Greem* Vs. *Chelto Watermarks Co.* (1890) 70 LT 547 a main belonging to the defendant completely burst and the water flooded the plaintiff's property. The company was not liable as there was no negligence and the company authorised by an act of parliament, laid the main pipes.

In *A. Prosser & Sone Ltd.* Vs. *Levy* (1955) I. W. L. R. 1224 CA where damage was caused by water flowing from a redundant pipe which was not the part of ordinary installation of water supply the defendants were held liable. The plaintiff could be taken to have consented to the exercise of the normal water installation but of this particular section of piping which served no purpose.

(vii) Act of God—The rule in *Rylands* Vs. *Fletcher* does not hold good where damage is done due to the act of God.

In *Nicholes* Vs. *Marsland*, some artificial lakes were fed by natural stream as it flowed through the defendant's estate. A storm of unusual violence caused them to over flow. The dams gave way ; and the flood water rushed down the course of the stream and damaged the plaintiff's adjoining property. It was proved that there had been no negligence in the construction or maintenance of the lakes, it was held that as flood was caused by the act of God, the defendant was not held liable.

(viii) Default of the Plaintiff—The rule is not applicable where the thing escaped due to the plaintiff's default. "No action at law can be maintained for any injury which has been brought about the wilful and the intentional act of the party complaining as its proximate and immediate cause, such act having been done by him with his eyes open, in other words, with the knowledge that the injury would be the probable consequence of the act so done by him.

In *Ponting* Vs. *Noakes* (1894) 2 Q. B. 291, the plaintiff's horse nibbed the poisonous leaves on the boundary of the defendant and died. It was held that the plaintiff could not recover because damages was due to the fault of the plaintiff himself, and there had been no escape of the vegetation.

CHAPTER XXIII

STRICT LIABILITY—ANIMALS

Q. Can the owner be held liabe for animal strying to highway ? Is there any exception to the rule ?

Ans. Liability for Animals—If animal stray from adjacent land on to the highway, the owner may be liable for the trespass to the owner of the soil of the highway, but if they do damage to anyone else or to his goods, the owner is not liable

This law has been maitained by the House of Lords in *Scarle* Vs. *Wallbank* (1947) A. C. 341 which laid down the rule that the owner of a field adjoining the highway is under no duty to prevent his cattle from straying to the highway (i) by fencing his land or (ii) by keeping any existing fence in repair.

In this case the appellant while cycling by night, with his light marked in accordance with blackout regulation was injured by a collision with the respondent's horse which had strayed to the highway through a gap in the respondent's fence which adjourned the highway. The country court judge held that the respondent was not liable for negligence and his decision was affirmed by the Court of Appeal and by the House of Lords.

Exception to the rule—This case does not apply where the animal is of savage disposition which is known.

In *Brock* Vs. *Richards* (1951) 1 All. E. R. 261 the plaintiff was riding his motor bicycle along the highway when a mare jumped over a hedge bordering the highway, descended on the motor bicycle and injured the plaintiff. The animal was over five years old, and had a propensity to stray, but the country court judge found that she had no dangerous nature.

On appeal it was held that the occupier of land bordering the highway was under no duty to prevent his animal from straying on the highway unless they were dangerous or mischievous. The fact that the mare in the present case was in habit of straying did not impose such a duty on the defendant and, therefore, he was under no liability to the plaintiff.

Sir Raymond Evershed, M. R. was of the opinion (i) apart from the case of special propensities, liability is not imposed on the owner of an animal by reason of special circumstances affecting the nature of the *locus in quo*, that it, not imposed because animal when straying goes over or through a hedge or down a bank and thereby creates the accident, (ii) it must be treated as clear that an animal, though, not savage, which is dangerous because of its frolicsome behaviour must be taken to have propensities against which (if he knows of them) the owner has a duty to guard.

If the horse was in habit of leaping over the hedges on passerby and that were known to the owner, he might be well under a duty to keep the horse tethered. But "where no special circumstances exist negligence cannot be established merely by proof that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature".

(ii) The second exception is where the escape of animals in such number causes obstruction. In such case the defendant shall be liable though animal may not be of dangerous nature.

In the Irish case of *Cunningham* Vs. *Whelan* (1971) 52, Ir. L. T. 67, the defendant was liable in negligence for the escape of mass of twenty-four bullocks and heifers which obstructed the highway, pressed on the plaintiff's cart and upset it. But if his is so it seems to be an instance of nuisance rather than liability for negligence.

Q. Write a note on the liability of owner of dog and cats for injuries caused by them to a third party.

Ans. Liability of owner of Dogs and Cats—The owner is liable for trespass by cattle. When it strays on highways, the owner is liable only when he is aware of the mischievous behaviour of that animal. However, the law does not apply in the case of dogs and cats. Cats and dogs fall outside this category and the owner of these animals are not liable under cattle trespass rule on account of their fleeting visits. Following reasons have been given :—

(1) A dog or cat is not usually confined, while the cattle can be.

(2) It is in the general interest of the community that dogs should be kept and allowed a reasonable liberty.

(3) Ordinary dog is less cumbrous than an ox or horse.

(4) That intransient incursions must be reckoned as more involuntary accidents.

(5) That is impossible to keep it under the same restraint as cattle.

(6) They are not larcenable at common law because there is no property in them.

In *Cox* Vs. *Burludge Willes J.* observed "I can quite understand a distinction being drawn between animals which from their natural tendency to stray, and thereby do real damage, require to be and usually are restrained, and a dog, which is not usually kept confined and there may be good reason besides *do-minimis non curat lex* why an action should not lie against a man whose dog without the will of its master enters another's land though it is different in the case of a horse or an ox."

A master of a horse or an ox is liable because of the fact that they do some substantial damage when roaming about. They do damage even merely wandering about and eating what attracts it. But is a different case with the dag or cat. A dog has natural propensity to roam about without causing substantial damage.

A dog is useful and it is not generally scout up, but is allowed reasonable liberty. The same thing can be applied in the case of cat. It is because of these special circumstances and their nature that an owner is not liable for the trespass by dog and cat.

In this case *C* cannot maintain an action against *A*. Cats like dogs do not fail under the category of cattle whose owner is liable for trespass. *A*, owner of cat, is not liable for doing damage to pigeons unless the nature of the cat was known to the master.

In *Buckle* Vs. *Holenes* (1926) 2 K. B. 125 the defendant's cat strayed from his land to that of the plaintiff and killed some fowls and pigeons there. The defendant was not held liable for cattle trespass.

Bankes, L. J. observed "In dogs there is natural propensity to change sheep ; and counsel has admitted that the true test is whether the animal is dangerous to mankind. In my opinion, it is quite impossible apart from legislation, to suggest that the owner of a cat is responsible for trepass which results in damage to an adjoining owner's pigeans.

Q. State briefly the law relating to the responsibility of people who keep animals.

Ans. Responsibility of people who keep animals—The responsibility of the owners of animals for damage done by them has developed along two main lines. One as a branch of the law of trespass ; and the other a branch of the law which imposes upon the owner of a dangerous animal or thing a duty to take measures to prevent it from doing damage. With respect to this second branch there are two classes of animals. The first includes animal *ferre naturae* and the second includes *Mausuetae Niturea.* The latter includes domestie animals like dogs, horse and cows *etc.* These animals are ordinarily not dangerous unless when they develop mischievous tendencies. The animal falling under the second eategory are dangerous like monkeys, elephants, bears, tigers and gorielas *etc.*

A person who keeps *farae Naturae* he keeps at his own peril. If he loses control over the animal and it does damage to some other person the master is responsible.

Lion, bear, wolf, a monkey and an elephant are regarded as savage animals. He who keeps these or similar animals keeps them at his own peril. He is bound to keep them so far under control as to prevent indulging in its propensity and inflicting injury. If such an animal escapes and causes hurt to any one, it is not necessary for the party injured to show that the owner know the animal to be specially dangerous. It is not material whether the owner knows it to be dangerous or not.

Lord Esher in Filburn Vs. *People's Palace and Aqurrium Company* observed : The law of England recognises two distinct classes of animals ; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent from doing injury and it is immaterial whether he knows if it will be dangerous or not. As to another class the law assumes that animal belonging to it are not of dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do unless he knows that it was dangerous.

Problems

Q. (a) 'B' daughter of 'A' has been living with his father. She kept a savage dog which injured 'C'. Can 'B' be held liable ?

(b) 'A', a master, asks his servant 'B' to tame a dog. The dog was of savage nature. This was brought to the notice of 'B' on several occasions by many persons. The dog bites 'C'. Can 'A' be held liable ?

Ans. (a) *B* is daughter of *A*, but for any mischief of dog *B* will be liable. The law on the point is that not only owners but also any persons who harbours animal is liable.

In *North* Vs. *Wood* (1914) I.K.B. 629 where the defendant's daughter, who lived the defendant, was the owner and had the control of a savage dog and the court held that the daughter was the person liable and not the defendant.

(b) *A* shall be held liable and *C* can recover damages from him. The law on the point is that the owner of the animal may be affected with knowledge of it even through the agency of another person. If master appoints his servant to keep the animal the servant's knowlede will be imputed to him.

In *Applebee* Vs. *Fercy* (1874) L. R. 9 C. P. 647 when *A* kept a savage dog, complaints to the barmen were held to be sufficient notice to the publican. whether the complaints were communicated or not.

CHAPTER XXIV

DANGEROUS CHATTELS

Q. Under what circumstances the defendant shall be liable for the damage done by dengerous chattels.

Ans. Damage done by dangerous chattels—The liability for damage done by dangerous chattels may be considered under the following heads :—

(i) Liability to visitors on defendant's premisees : If on the premises of *A*, *B* as a visitor, is injured by a dangerous chattel, *A* is liable to *B*.

(ii) Liability to immediate transferee of the Chattel :

(a) Under Contract—Where a dangerous chattel is delivered by the defendant to the plaintiff the liability of the defendant depends on the terms, express or implied, of the contract between them.

The extent of responsibility varies in different classes of contract, "Extent of obligation must vary with the occupation of the person delivering the article ; for example, it would be higher in the case of chemist selling a dangerous chemical than in case of a layman."

In *Hyman* Vs. *Nye* (1881) 6 Q. B. D. 658 when a horse and carriage were hired and the hirer was injured in consequence of a defect in the carriage he was entitled to recover because the carriage was not in a reasonably fit and proper condition for the purpose for which it had been hired.

(b) Under gift or loan—In the case of gratuitous loan or gift of a chattle, on other hand, there is not even the duty of reasonable care. The donor or lender of a chattel owes no duty except to give warning of any dangers actually known to him.

(c) In Tort—The transferor is also liable in tort to the transferee who is injured by a chattel. In *Clarke* Vs. *Army and Navy Co-operative Society Limited.*, the vendor of tin of disinfectant powder who knew that it was dangerouse to a person opening it without special care, was held liable to the purchaser for omitting to warn him of the danger.

Problems

Q. (a) 'A' sent a girl 'B', to bring a loaded gun 'B' in play pointed it at 'C'. She drew the trigger and wounded 'C'. Can 'A' be held liable ?

(b) 'A', a landlord, had in the kitchen a boiler without a safety valve. The boiler during the frost burst and injured 'B's' daughter 'C'. Can 'A' be held liable ?

Ans. (a) In this case *A* will be liable for the injury done to *C*.

Chattels which are inherently dangerous, a special care is required and law exacts a degree of diligence so stringent as to amount practicallly to a guarantee of safety.

The liability of dangerous chattels is based on the law of negligence, In this case *A* has been negligent in not getting the gun unloaded and asking a girl to bring it.

In *Dixon* Vs. *Bell* (1816) M & S 198 where the defendant sent a young girl to fetch a loaded gun, and she in play pointed it at the plaintiff, drew the trigger and wounded the plainitiff. The defendant was held liable.

It was observed "that it was the duty of the defendant to render the gun "safe and innoxious" but he, due to want of care, left the gun capable of doing mischief.

(b) In this case *A* will not be liable. If the proximate cause of the danger is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable.

In *Ball* Vs. *L. C. C.* (1929) 2 K. B. 159 where during the tenancy landlord had in the kitchen a boiler without a safety valve and the boiler during the frost burst and injured the tenant's daughter, the landlord was not held liable.

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CHAPTER XXV

DANGEROUS LAND AND STRUCTURES

Q. Discuss the liability of an occupier of a premises towards a person who comes thereon in pursuance of a contract. What changes "The Occupiers Liability Act 1957" brought in the existing law ?

Ans. Liability of occupier of Premises—An occupier owes highest duty to a person who pays him for permission to enter his premises for scme agreed purpose.

In *Francis* Vs. *Cockvell* (1870) L. R. Q. B. 184, the plaintiff bought a ticket for a seat on the grand stan to view some steep lechases, and sustained injuries form the falling of the stand. It was proved that the stand had been negligently constructed by a firm of contractors though the defendant was not aware of it. Nevertheless it was held that the defendant was liable.

There are two exceptions to the rule in *Francies* Vs. *Cockvell* ;

(i) where the terms of contracts exclude it, and

(ii) where there is a sale of lease of dangerous premises.

Occupier Liability Act 1957—There was lot of criticism of the rule regarding occupier's liability : The matter was referred to the Law Reform Committeee. The Committee after surveying the whole common law on this point made certain recommendation. Parliament enacted Occupier's Liability Act 1957.

The Act brought forward many important changes in the existing law. The Act has reduced the categories of visitor to two *i. e.*, lawful visitors and trespassers and provided that only one duty is owed to all lawful visitors. The rule enacted in this Act "have effect, in place of the rules of the common law, to regulate the duty which an occupier of the premises owes to his visitor in respect of dangers due to the state of the premises or to things done or omitted to be done on them." (Section I). Some of these changes are as follows :—

Common duty of care—"The common duty of care" has been defined in Section 2 (2) as duty to take such care as is reasonable in all cases to see that the visitor will be reasonably safe in using the premise for which he is invited or permitted by the occupier to be there.

Warning—If a warning has been given, in all cases it will not exempt the occupier. At common law there was no responsibility of occupier if warning was given before. But now the rule is changed by the Act which provides that where "damage is considered to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without mere absolving the occupier from the liability, unless in all circumstances it is enough to enable the visitor to be reasonably safe."

Assumption of risk—In case the visitor is aware of the existence of the danger, the occupier under the Act may not be liable. The Acts provide that if a visitor willingly accepts the risk, there is no liability for the injuries received by him. It recognises the common law principle that a danger ceases to be danger to those who have knowledge of it.

Contributory Negligence—If the plaintiff knows about the danger it is sufficient proof that the Plaintiff is also responsible for Contributory Negligence.

Independent Contractor--If a person enters the premises under the terms of contracts he will be entitled to the common law duty of care in the absence of any express provisions in the terms of the contracts. Act has enacted, expressly abolishes the common law rule only in relation to invitees and licensees.

Some Special cases within the Act

(i) **Fixed or movable structure**—Section 1 (3) enacts that "the rule so enacted in, shall also be applied in like manner and to the like extent as the principle applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate.

(a) the obligation of a person occupying or having control over any fixed or movable structure, including any vessels, vehicle or Aircraft.

(ii) **Damage to property**—"The obligation of a person occupying or having control over any premises or structure in respect of damage to the property including the property of person who are not themselves his visitors."

(iii) **persons exercising Public and Private right of way**—In Common law the Grantor of a public right of way, owed on duty of care with regard to state of way. Perhaps this immunity remains unaffected by the Act.

Q. Discuss the liability of an occupier of premises towards an invitee.

Ans. "The invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he has common interest." It is the duty of the occupier of the premises to use reasonable care to prevent injury from unusual danger of which he knows or ought to know.

This rule was laid down in *Indermaur* Vs. *Dames* (1866) 2 C. P. 311 the plaintiff was a journey man gas fitter employed by *X*.

Under a contract with the defendant, *X* had fixed a patent gas regulator in the Sugar Refinery of the defendant. *X* had directed the plaintiff to test some burners of the defendant's premises in connection with the regulater, while he was doing so, the plaintiff without any fault on his own part feel through an unfenced shaft and was injured. The plaintiff sued the defendant and the judgment was given in favour of plaintiff. Whilles J. delivering the considered judgment of the court Erle, J. C. Willes, Keating and M. Smith JJ. said, "......what is the law as to the duty of the occupier of a building with reference to resorting thereto in the course of business upon express or implied. The common case is that of a customer in a his invitation, shop, but it is obvious that this is only one of a class...... The class to which the customer belongs includes persons who go upon business which concerns the occupier and upon his invitation, express or implied. And with respect to such a visitor at least, we consider it settled law, that he using reasonable care on his part for his own safety, is entitled to except that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know ; and that, where there is evidence of neglect, the question whether such reasonable care had been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact." This case, therefore, establishes the principle that towards an invitee, the occupier of premises must use reasonable care to prevent injury from unusual danger of which he knows or ought to know.

The word "invitee" does not mean every person invited on to premises. Only those who enter on business which concerns the occupier at his express or implied invitation are invitees. A guest is not an invitee.

Q. Who is a licensee. Discuss the liability of an occupier to licensee.

Ans. Who is licensee ?—*A* licensee is that person to whom permission to enter the premises has been given, but who does not have a common interest with the occupier of the premises. He may be defined as one who enters the premises of another either with his consent, express or implied, or by virtue of legal right to do so. He should not enter the premises for the purpose of doing business which is in the interest of both *e. g.*, occupier and licensee.

A guest at a house is licensee. A customer of a shop occupied by a licensee, under a lease he is a licensee of the lessor when approaching the shop over a forcecourt in the ownership of the lessor and not included in the lease of the shop. Persons who enter premises to seek orders, to beg or to hold any communication with the occupier is licensee. It is also settled that persons visiting public parks or recreation grounds are licensees.

In *Fairman* Vs. *Prepetual Investment Building Society* (1923) A. C. 74. The defendant's society owned a block of flats. One of the flats they let out to *X*. The Society remained in possession and control of the common stair case which gave access to the various flats. The plaintiff lived with *X* for 18 months and used the stair case constantly. The stairs were made of concrete with iron bar burried in the concrete of each stairs and running across its breadth. In one of the stairs, the concrete had been so much worn that a hollow formed behind the bar itself was still covered by the concrete. The defect was obvious to any person with ordinary powers of observation and during ordinary care. The society was not aware of it. The plaintiff coming down the stair during day time, caught her heel in the hollow, fell and was injured. She knew of the hole of the stair.

A licensee is said to enter premises at his own peril. He must take the premises as he finds them. He is, however entitled to have warning of concealed danger of which occupier is aware. A licensee is not entitled to warning of any danger which the occupier does not kn ow of a danger which is obvious.

The only exception to this rule is that the occupier must not lay trap for him to or expose him to a danger not obvious and not to be expected under the circumstances. If the danger is clear it is for licensee to keep himself safe. If some danger is expected to be there he must expect and take his own precautions. If he walks blindfold, he walks at his own peril, even though he is blindfold by the action of elements. As usual in cases of duties of care the reasonable man is standard on both sides. The licensee must act with reasonable diligence to prevent his premises from misleading or trapping a licensee, who on his side uses reasonable judgment and conduct under the circumstances that can reasonable be foreseen.

Q. Who is a trespasser ? Discuss the liability in tort to a trespasser.

Ans. Who is trespasser—A trespasser is one "who goes on the land without invitation of any kind and whose presence is either unknown the owner or, known, is practically objected to." Trespasser is one who has no permission or lincensce to enter another's premises.

Salmond says that it is difficult sometimes to distinguish between a trespasser and a person entering lawfully by the tacit permission of the occupier. Thus the occupier silently invites and permits certain classes of persons to enter his garden gates and come to the front door. If his dog bites a person so entering liability will depend on whether that person falls within the class of persons, so silently invited for otherwise he is a mere trespasser to whom no liability is owing. Who then, are thus entitled to enter and to complain of injuries sustained ? What shall be said, for example, of hawkers and beggars who enter to ask their way. The only acceptable conclusion would seem to be that no persons is to hold any manner of any communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited.

Liability to a trespasser—The occupier has no duty to warn him of existing defects. The general principle is that he who enters wrongfully enters at his own risk in all respect and the trespasser must take, the land or structure as he find it, but this rule is subject to the two exceptions :

(i) **International harm**—An occupier who intentionally harms a trespasser by creating on his premises any source of danger for that purpose is liable for the harm so done unless it is self defence. This means a trespasser is not always without a right.

In *Bird* Vs. *Holboork* (1828) 4 Bing 728 where the defendant having had fowls stolen from his garden set in the garden for its fucture protection a spring gun. The plaintiff a boy, was in search of a fowl which had strayed into the garden, got over the garden wall and coming in to the contact with the gun, was ijured. The defendant was held liable.

But the occupier will not be liable to protect his property from trespasser if he protects it by means of spikes and broken glass on the top of a wall.

(ii) **Duty to trespasser known to be present**—Secondly the occupier will be liable to the trespasser if he knows his presence in his premises and even then does some act which harms him.

In *Mourton* Vs. *Poulter* (1930) 2 K. B. 183, A nursery man who was felling a trees, while some trespassing children were watching was held liable to one of the children, who was injured because he failed to give warning when he knew that the tree was about to fall in the children's direction. In this case though the plaintiff was a trespasser he could recover damages from the defendant.

Q. A, parked his car in a street and left his dog inside the car. The dog had always been quite and docile. As the plaintiff was walking post the car, the dog, which had been barking and jumping about in the car smashed a glass panel, and a splinter injured B's eye. B who was a passer by had to go to doctor to have the glass splinter removed. Will B succeed in getting damages from A whom he sues for the same ?

Ans. No. *B* would not succeed because a motor car with a dog inside it was not a thing which was dangerous in itself and as the accident was so unlikely that there was negligence on the part of a *A* could be attributed.

Q. "In cases of trespass there can be no difference in the case of chidern and adults, because there is no duty to take care that cannot vary according to the trespasser."

Comment on the above statement.

Ans—Trespssby children and adults—If a child is trespasser he cannot recover unless the danger or traps were put there to cause injury to him.

In *Addie & Sons Ltd.* Vs. *Dumbreck* (1929) A. C. 358, Dumbreck a boy aged four years was killed by being crushed in the turnal wheel of a a haulage system on land belonging to the company. Colliery officials knew that the public were in the habit of using the land as short cut, and that children played about. But they, at times, warned children out of field and reproved adults. The boy's father had also warned him not to go near the wheel. As the time of the accident the employees could not see the child as they were at further end of the machinery.

It was held by the House of Lords that the colliery was not answerable in damages for child's death as he was held to be a trespasser, "But if a person is trespasser, then the only duty of proprietor has towards him is not maliciously to injure him, he may not shoot him, he may not set a spring gun, for that is just to arrange to shoot him without personally firing the shot."

Exception—There are however, certain exceptions to the rule. They are as follows :—

(a) Where an occupier habitually and knowingly says nothing to the trespass of the children these children cease to be trespasser and become licensee. And here also to give this warning of danger is not sufficient, if the licensee is too young to profit by it.

(b) The fact that the object on the defendant's land is attractive to children makes it easier to infer that they have implied permission to enter the land. The fact, that the object is dangerous for the children is evidence of the special duty cast on the defendant to give them adequate warning.

CHAPTER XXVI

INTERFERENCE WITH FREEDOM OF CONTRACTS OF BUSINESS

Q. If 'C' has an existing contract with 'A' and 'B' is aware of it, and if 'B' persuades or induces 'C' to break the contract with the resulting damage to 'A'. Is 'B' liable ?

Ans. Procuring a breach of contract is a tortious act for which *B* will be liable to *A* for injury he has done to him.

In *Lanley* Vs. *Gye* (1853) where the plaintiff a manager of theatre had entered into a contract with Miss Wanger an Opera Singer, whereby she bound herself for a period of three years to sing in the plaintiff's theatre and no where else. The defendant knowing of the existence of this contract and as the declaration alleged, "Maliciously intending to injure the plaintiff" enticed and procured Miss Wanger to leave the plaintiff's employment. Clearly here was a case of interference with a relation personal service but the relation was totally devoid of any trace of status in the true sense. It was held by the court that it is an actionable wrong knowingly and unjustifiably to induce a person to commit a breach of contract which he has entered into with another, who suffers consequential damage.

By the end of the 19th century it has been clearly established as a result of a number of cases that it is an actionable wrong without justification to interfere with the contractual rights of another.

Since it has now been established that interference in contractual right is „actionable. *B* is liable.

Q. What accorning to Salmond are the elements in an actionable interference with contractual rights ?

Ans. Elements. In an Actionable Interference with contractual Rights - According to Salmond that following are the elements of an actionable interference with contractual rights.

(i) When a third party with knowledge of the contract and the intent to procure its breach, directly persuades or procure induces one of the parties to that contract to break it.

(ii) When a third party, instead of acting on the mind of contract breaker, physically detains him from or otherwise renders it impossible for him to perform his contract *e. g.*, by breaking his essential tools or machinery. These acts must, of course, be done with knowledge of the contract and intent to bring about its breach.

(iii) When a third party and the contract breaker deal together in a manner which the third party knows to be inconsistent with the contract *e. g.*, when *A* pays for delivery of a new car from *B*, knowing that it is offered to him in breach of British Motor Trade Association convenant against the resale of new cars. The tort is only committed if the inconsistent dealings is begun, or continued after the third party has notice of the contract.

(iv) "Again so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract, against the will of the both and without the knowledge of the either, if, with knowledge of the contract, he does an act which, if done by one of the parties to it, would have been a breach.

(v) When a third party, with knowledge of the contract and intent to secure its breach, definitely and unequivocally persuades, induces, or procures the servant of one of the parties to break his contract of employment, provided that the breach of contract forming the alleged subject of interference in fact ensues as a necessary consequence of the breach of the contract of employment. It must be clearly shown that the effect of the withdrawal of the services of the particular servant concerned was to render it quite impracticable for the contract breaker to perform the contract.

Q. "Interference with contract is not tortious if it be justifiable". What in this context, is meant by justification ?

Ans. Interference with contract—While the general proposition with regard to interfence with contractual rights was thus well established no corresponding definition was given of what amounts to justification for such interference.

In *Read* Vs. *Friendly Society of Operative Stone Masions* (1902) 2, K. B. 88 Darling J. instanced as an example of justification the case of a man who had entered into two inconsistent contracts with *A* and *B*, and could not perform the one without breaking the other. In such case it was suggested that *A* insisting on his contractual rights, was not liable at the suit of *B*.

The Crafter case, Viscount Simon gave yet another instance in the following words : "In some case, however, *B* may be able to justify his procuring of the breach of contract, for example a father may persuade his daughter to break her engagement to marry a scoundrel. The father's justification arises from a moral duty to urge *C* that the contract should be repudiated. The same principle applies where a medical man advises his patient not to work at a certain time on health reasons and the patient acting on the advice breaks his contract of employment.

Q. Give the facts and the principles laid down in *Thomas* Vs. *Deakins (1952) Ch. 646.*

Ans. Thomas Vs. **Deakins, (1952) Ch. 646**—In this case the plaintiff were printers and publishers of a periodical employing non-union labour. The paper they used was supplied under a contract by Bowwater Sales Ltd. The plaintiff dismissed one of the wrokman, who had become a member of the National Society of Printers, commonly known as "Natsopa", that union on April 19, 1952 called out on strike its members who were employees of the plaintiff. At the same time officials of Natsopa called on other unions to support them. Thereupon Bowwater drivers, who were members of the transport and General workers union, informed Bowwater on April 25, that they might not be prepared to deliver the paper the plaintiff which was due for the delivery the following Monday. The loaders who were members of the National Union of Printers, Book Binders and Paper Workers, also informed Bowwater that they might not be prepared to load paper for delivery to the plaintiffs. Bowwater never required the loader to load or their drivers to deliver paper to the plaintiff but informed the plaintiff that they would not be able to deliver the paper in accordance with the contract. No paper in fact was delivered after April 28, the plaintiff sought an injunction to restrain the defendant, who were officials of the several unions concerned either themselves or by their servants or agents to do any breach by Bowwater of their contract with the plaintiff to supply with the paper or other goods.

Held—It was held by the Court of Appeal that the plaintiff were not entitled to an injunction. They observed as follows :—

(i) The main question is whether the principle laid down in *Quinn* Vs. *Leatham* (1901) A. C. 495 to the effect that any violation of Legal right including right under contract, committed knowingly and without justification, a tortious act applies in the case ?

(ii) The above is a broad statement which might appear to cover a case such as the present but it is subject to certain limitation.

(a) If a man acting lawfully and in all respects within his right, causes as a result of what he does, loss to another, that other has no remedy though the loss he suffers is the necessary and inevitable consequence of the acts of the first person.

(b) It makes no difference to the matter that the doer, the first person, in action was actuated by malice or spite against the person who suffered damage.

It is true that there are some actions in tort of which malice may be gist of the case. It occurs, for example in the law relating to defamation and in regard to malicious prosecution. But in the persent case malice plays no part and is an entirely irrelevant consideration.

(iii) The general proposition, noted in (a) and (b) above are subject to the tort of procuring breaches of contract where the actor must have acted with the intention of doing damage to the person damaged and that he must have succeeded in his efforts.

(iv) Thus, tort may be committed in three main ways (a) by directly inducing a party to break the contract (b) by procuring a breach directly and (c) by procuring a breach indirectly *i. e.*, by inducing a third person.

As to (a) and (b) where there is such a direct intervention by the intervener, the intervention itself is considered wrongful. A simple case is where the intervener physically detains the contracting party so that the contracting party is rendered unable by dentention to perform the contract.

As to (b), (c) the rule is that where a third party causes breach of contract through the act of the servans or servant of the contract breaker the third party will not be liable for procuring a breach of contract unless he induced the servant to comit acts that are themselves legally wrongful.

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CHAPTER XXVII

IMPORTANT PROBLEMS AND CASES ON LAW OF TORTS

Q. State the principle laid down in Donoghue Vs. Stevenson, 1932, A. C. 562.

Ans. Donoghue Vs. Stevenson, 1932. A. C. 562—In this case, a friend of the plaintiff had brought for her a sealed bottle of ginger-beer from a case. There were the remains of a snail in the bottle. This could not discovered until the plaintiff consumed most of the gingerbeer. The plaintiff suffered as a result of taking the gingerbeer. She filed a suit against the manufacturers of the gingerbeer for *negligence*.

It was *held*, that the manufacturers were liable as they owed a duty to take care to the plaintiff who has the consumer of the goods manufactured by them and sold in a sealed bottle.

In this case, Lord Atkin laid down the following new *concept of duty to care* :

> "You must take reasonable care to avoid acts or omissions which you can reasonably foesee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seems to be persons who are so closely and directly affected by my act that I *ought reasonably to have them in contemplation*, as being so affected when I am directing my mind to the acts or omissions which are called in question."

Q. Distinguish Conversion and trespass.

Ans. Distinction Between Conversion and Trespass—There are the following three points of distinction between conversion and trespass :—

(i) As to right to possess :

(ii) As to intention to possess ; and

(iii) As to gist of action.

(i) The Distinction as to right to possess—Conversion is wider than trespass, because in an 'action for conversion the plaintiff need not prove actual possession', but can sue if he had 'an immediate right to possess'.

Trespass is a wrong to 'possession' and cannot, therefore, be committed 'by the actual possessor'. But an actual possessor can be sued' in conversion by the person who has the immediate right to possess. Thus, a purchaser who has paid the price but has not yet obtained possession, can sue his vendor for conversion.

(ii) The Distinction as to intention to possess—To damage or middle with the chatted of another, but without intending to exercise an *adverse* possession over it, is a trespass. A conversion is a breach, made adversely in the continuity of the owner's dominion over his goods, though, the goods may not be damaged.

(iii) The Distinction as to gist of action—In trespass the gist of action is the 'force' and direct 'injury' inflicted. In conversion it is the 'deprivation of the use'.

Q. State the facts of and the principle laid down in Armory Vs. Delamirie

Ans. Armory Vs. Delamirie—In this case, a boy who used to sweep the chimney had found a valuable jewel. The boy took the jewel to a goldsmith with a view to ascertaining its value. Taking an unfair advantage of the boy's simplicity, the defendant, the goldsmith: told him that it was worthless and offered him a partly sum of three half pence for it. The boy refused to take this amount and demanded the jewel back.

In this case it was held as below :—

> "Though the finder of a chattel does not buy such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner and consequently he may sue for its value any wrongdoer who has wrongfully converted it."

Principle laid down—The finder of a chattel has a good title against *all* except the true owner.

Q. What are the defences to an action for conversion ?

Ans. Defences to an action for conversion—The following defences may be availed of by a defendant in an action for conversion :—

(1) That he has alien, either general or particular, in respect of the chattel.

(2) That he has a right of stoppage in transit, arising out of a contract.

(3) That the plaintiff has no right to property, provided the plaintiff sues on his right only.

(4) That the sale in market is overt. The purchase in such a case cannot be sued for conversion, while the seller can be.

(5) That the goods were taken under distress or in execution of a decree.

Where a person sells goods to which he has no title, the provisions of section 108 of the Indian Contract Act, 1872 will apply.

Q. What must the plaintiff prove in the tort of false imprisonment ?

Ans. In order to succeed, it is necessary for the plaintiff to prov on 'actual imprisonment' in the sense of imprisonment in a jail, *i. e.*, a complete deprivation of his liberty. If a person is unlawfully prevented from going in a particular direction, no action will lie in tort for false imprisonment.

Q. Explain the rules that govern the liability of a publisher of a newspaper reporting parliamentary proceedings which contain a defamatory statment about a citizen.

Ans. Fair Reports of Parliamentary Proceedings—A fair and accurate report of any proceedings or debate in either House of Parliament, or in Legislatures of States or in any committee of such Parliament/Legislature, is privileged even though it contains matter defamatory of an individual.

Q. Define 'Innuendo'.

Ans. Innuendo—There are cases in which defamation is not, in terms of 'apparent' or *prima facie* clear. Such defamatory statments are often couched in subtle language, *i. e.* the words which are not defamatory in ordinary sense may nevertheless, convey a defamatory meaning owing to the 'particular' circumstances in which they are spoken. In such cases, the plaintiff in order to succeed in an action for defamatory must prove an 'innuendo'. By 'innuendo' is meant this explanatory statement that though the words are not libellous in their 'ordinary' sense, they had, in fact, a 'specified libellous meaning in the circumstances of the case.

Example—*A* says to *B* : "*C* is a very honest man. He never stole my fountain pen."

The *innuendo* or the real or underlying meaning of *A*'s statement is that *C* did, in fact, stole his fountain pen he being dishonest. The following case will make the point clear :—

Cassidy Vs. *Daily Mirror*, (*1929*) 2 *KB 331*—In this case, the defendants, publishers of the Daily Mirror, published a photograph one *A* and a Miss *X*, together with the caption : "Mr. *A*, the race-horse owner and Miss *X*, whose engagement has been announced." The plaintiff, wife of Mr. *A*, brought an action against the defendants. It was hold that the publication was capable of conveying a meaning defamatory of the plaintiff to the effect that she was not the lawful wife of Mr. *A* and was living with him in immoral cohabitation.

In this case, the caption read separately conveyed a different meaning and if read together it conveyed another meaning.

Q. What are the defences to an action in tort ?

Ans. **Defences to an action in tort**—There are the following fifteen defences to an action in tort :—

(1) Acts of State.
(2) Quasi-Judicial Acts.
(3) Judicial Acts.
(4) Executive Acts.
(5) Works of necessity.
(6) Authorities of necessity.
(7) Parental and quasi-parental authority.
(8) Statutory authority *i. e.* acts which have been authorised by Statute.
(9) Mistake of Pact.
(10) Leave and licence.
(11) Inevitable accident.
(12) Private defence.
(13) Exercise of common rights.
(14) Acts causing slight harm.
(15) Plaintiff is a wrong-doer.

Q. States the facts of and the principle laid down in Hewitt Vs. Bonvin.

Ans. *Hewitt* Vs. *Bonvin*. (*1940*) *1 K. B. 188*—In this case the son drove his father's car. A son obtained from his mother, who had authority to grant it, permission to drive his father's motor car. The son wanted to use the car for his own purpose of driving two girl friends to their home. Both the father and the mother were not aware of the girls and it was no concern of either of them that the girls should be driven to their home. On return journey, a friend who had accompanied the party was killed through the negligent driving of the son. In an action brought against the father by the administrator of the deceased man, it was *held*, that the son was not driving the car as his father's *servant* or *agent* for his father's *purposes* and, therefore, the father was *not* liable for his son's tortious acts.

The relation of master and servant exists only between persons of whom the one has the 'order' and 'control' of the 'work' done by the 'other'. A son, is 'not', in law, a servant of his father.

Q. What do you understand by the maxim 'Qui facit per alium facit per se'?

Ans. Maxim "Qui facit per alium facit per se"—This maxim means: "he who does an act through another is deemed in law to do it himself". In other words, a person who puts another in his place to do a class of acts in his absence, necessarily leave him to determine, according to circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; consequently he is answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act, under circumstances in which it ought not to have been done, provided that what is done is not done from any caprice or the servant, but in the course of his employment.

Q. State the liability of fire-arms dealers.

Ans. The persous dealing with loaded fire-arms are answerable for damage done by their explosion, even if they have used apparently sufficient precaution. Their liability is absolute. In order to succeed the only caution that will be held adequate in point of law is to deprive it of its dangerous character altogether. The following case will make the point clear.

Dixon Vs. *Bell*, (1816) 5 *M. & S.* 198—The defendant had left a loaded gun with one of his friends. He sent a young girl to fetch with instruction to this friend to remove the priming. The friend though he had removed the priming, but, as it turned out, he did not do it effectively. In the way, the girl, thinking that the gun would not work, jokingly pointed it at the plaintiff's child and drew the trigger. The gun went off and the child was wounded.

It was *held*, that the defendant was liable, though he had used sufficient care. It was observed that "it was incumbent on him (defendant) who, by charging the gun, had made it capable of doing mischief, to render it safe and harmless. The gun ought to have been so left as to be out of all reach of doing harm."

It was further pointed out that "the intervening negligence of the servent was no defence."

Q. Discuss the fact and the principles laid down in any one of the following cases:

(*i*) *Donoghue* Vs. *Stevenson* (*1932*) A. *C*. *562*.

(*ii*) *Lumley* Vs. *Gye* (*1853*) *2 E. & R. 216* (*Lucknow 1970*).

Ans. *Donoghue* Vs. *Stevenson* (*1932*) *A. C. 562*—This case has been discussad above.

Lumley Vs. *Gye* (*1853*) 2 *E. & R. 216*—In this case one Miss *A* had contracted to act at the plaintiff's theatre for three months. The defendant had induced Miss *A* to break her contract with the plaintiff.

It was held that a theatrical manager was entitled to recover damages in action of tort for the act of another theatrical manager in inducing a certain Miss *W* to break her contract to act at the plaintiff's theatre for three months. This rule is not confined to contrracts of *personal* service only. It is applicable to all kinds of contracts.

In this connection, it may be pointed out that procuring a breach of contract is *actionable* ; but no action lies for procuring another to *refuse* to perform a contract with the plaintiff, even if it be done maliciously, provided that wrongful means are not employed.

Q. State the facts and principle laid down in Read Vs. Lyons & Co., (194) A. C. 156.

Ans Read Vs. Lyons & Co. (1947) A. C. 156—In this case the plaintiff while performing her duties as inspectress of Ministry of Supply was injured in an-explosion in the defendant's munition factory. The plaintiff brought an action against the defendant for damages, but did not plead negligence on the defendant's part. She took the plea that her claim came under the strict liability rule in *Rylands* Vs. *Fletcher*.

The plaintiff's plea was rejected and it was held that the accident took place within the factory of the defendant and there was *no escape from the land of the defendant of something likely to do mischief if it escapes*. The rule in *Rylands* Vs. *Fletcher* is confined to dangerous things *per se*.

Q. On alighting from his car 'A' ordered his chauffeur to take the car direct to the garage. The chauffeur, hewever, drove the car to his own quarter, took his meals, and whilst driving the car the garage of his master, negligently drove it into 'B' s'' car and caused damage to it. Will 'B' succeed in an actiou for damages against A ?

Ans. Yes, *A* is liable in damages, for, at the time of the accident, the chauffeur was acting in the course of his employment. It is a case of master's liability to third persons for servant's tort.

Q. State the facts and principle laid down in Fitter Veel, (1901) 12 Mod. 542.

Ans. Fitter Veel (1901) 12 Mod. 542 – In this case the plaintiff had recovered damages for battery. He discovered thereafter that his injuries were far more serious than was at first supposed, and a surgical operation became necessary.

The plaintiff's second suit for additional damages was dismissed as not maintainable. It was held that more than one action will not lie on the same cause of action. The plaintiff had only one cause of action which had been wholly extinguished by the damages recovered in first suit.

Q. State the facts and principles laid down in stanley Vs. Powell, (1891) I Q. B. 86.

Ans. Stanley Vs. Powell (1891) I. Q. B. 86—In this case the defendant, a member of a shooting party, had fired at a pheasant. One of the pellets bounced off the breach of a tree and accidently wounded the plaintiff, who had been employed for carrying cartridges and game for the party.

In an action brought by the plaintiff, it was held that the defendant was not liable. The *ratio decidendi* in this case has been criticised as erroneous, though the decision itself can be supported on the ground of *volenti non fit injuria.*

Q. State in brief the facts and the principles laid down in Stephens Vs. Myers, (1830, 4 C. & P. 349).

Ans. Stephens Vs. Myers, (1830, 4C. & P. 349)—In this case, the plaintiff was the chairman of a parish meeting. The defendant behaved very vociferously. A motion was passed by a majority that he should be turned out. The defendant reacted by saying that he would rather pull the Chairman out of the chair than he turned out of the room. Saying this he advanced towards the chairman with his first clenched. He was stopped by the churchwarden who was sitting next to the Chairman. In an action brought against the defendant, the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman. The jury fined the defendant with one shilling damages.

Tindal C. J., said ; "It is not every threat, when there is no actual personal violence, that constitutes an assault, there must, in all cases be the *means* of carrying the threat into effect. The question I shall leave to you will be whether the defendant was advancing at the time, in a threatening attitude to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped though he was not *near* enough at the time to have struck him yet if he was advancing with that intent, I think *it amounts to an assault in law*. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assalut in law."

Q. 'A' was contesting an election for mebership of U. P. Legislative Assembly. 'B' his friend went to cast vote for 'A'. 'C' who was a Presiding Officer wrongfully refused to allow 'B' for casting his vote. 'B' came back without voting. When the election was over 'A' was found successful and was finally declared elected as a member of the Legislative Assembly of Uttar Pradesh. Now 'B' brings an action under the law of torts, against 'C' for wrongfully stoping him ftom voting in favour of 'A'. 'C' set up a defence in his

favour that no harm has been done to 'A' by his wrongful act because he has already been elected as a member the Legislative Assembly despite his wrongful act. How would you controvert 'C's' defence? Give reason for your answer.

Ans. This problem is based on the facts of *Ashby* Vs. *White* (1903) 2 Ld. Taym, 938 in which it was held that under law of torts an act becomes actionable though there may not be actual harm. The action was allowed on the ground that the violation of the plaintiff's statutory right was injury for which he must have a remedy and was actionable without proof of pecuniary demage.

When there is a violation of right the law presumes damaged and it is immaterial whether any actual damage has been done or not. In cases of assault, battery, libel, mere wrongful act is deemed actionable.

In the instant problem it is immaterial whether *A* suffered any damage or not. The question was whether any right of *A* had been violated or not. Clearly *A*'s right to cast his vote had been violated and this was sufficient to make *C* liable any pay damages.

Q. 'A' and 'B' are owners of separate but contiguous land. 'B' has a tank on his own land, on which there are wild ducks. With the help of boats and decoying ducks, he catches some and sells them in the market. 'A' goes to the edge of his own land and fires a gun which scares the ducks and they fly away. Is 'A' liable for damages?

Ans. This problem is based on the facts of *Hollywood* Vs. *Emmett*, (1936) 2 K. B. 468, in which it was held that no proprietor can create noise on his own land to the annoyance of other. Therefore, *B* could claim damages and get an injunction restraining *A* from scaring his ducks.

In the above case, the plaintiff carried on the business of breeding silver foxes on his land. During the breeding season, the defendant who owned a neighbouring field, out of spite used to fire guns on his field in oreder to frighten the foxes. The plaintiff filed a suit against the defendant for injunction. It was held that the plaintiff could get the injuction, because no proprietor can create noise on his own land to the annoyance of others.

Q. 'A' a young child just above the age upto which children are entitled to pass free, was being carried by his mother who took a ticket only for herself. When 'A's' mother took her ticket no question was asked about 'A's' age, and there was no intention on the part of the mother to defraud the defendants. 'A' was injured in the course of the journey. 'A' brought an action against the defendants for damages for injury due to the negligence of the defendants. Will 'A' succeed?

Ans. This problem is based on facts of *Austin* Vs. *W. Railway* Co., (1867) L. R. 2 Q.B. 442. In this case it was held the defendants were liable either:—

(a) **On entire contract** to carry the mother and the child which operated in favour of each, or

(b) **Independently of contract** because the child was accepted as a passenger, and this cast a duty on the defendants to carry him safely; such a passenger is, on the absence of fraud, in the position of using the company's property by invitation.

Q. 'A' erects a radio aerial mast on the building of his roof. Owing to a very high wind, the mast is broken and it falls across the roof of 'B's' house resulting in injury to 'C'. Is 'A' liable to 'C'?

Ans. A is not liable to *C*, because no one is liable for *vis major*.

Q. The branches of 'A's' neighbour's mango tree are overhanging 'A's' land and the roots have spread in to it so that 'A' can grow almost nothing underneath 'A'. Advise 'A' whether he should (a) cut down the branches, (b) sever the roots, (c) for either purpose walk upon his land or put his hand over the boundary, (d) burn the wood and eat any mangoes on the branches cut down.

Ans. *A* may be advised as below:—

(a) Yes.
(b) Yes.
(c) Yes, after notice.
(d) No. *A* shall have to pay the price of the mangoes.

Q. Write a brief note on the 45 degree rule.

Ans. The rule of 45 Degree—When the height of the wall or obstruction which is built opposition the "ancient lights" is not greater than the distance between it and "ancient lights", it does not, in the eye of law, constitute, a material obstruction. In other words, a building does not, in the eye of law, constitute a material obstruction when its elevation (45 degree) subtends an angle not exceeding at the base of the light alleged to be obstracted.

Q. 'A', a landowner, and 'B', millowner, have for fifty years enjoyed the use of a stream which is supplied by percolating underground water. They have lost the use of the stream after 'C', an adjoining owner had dug on his own ground, an extensive well for the purpose of irrigating his fields. 'A' brings an action for damages against 'C'. Will 'A' succeed?

Ans. The principles regulating the rights of owners of land in respect to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in known channels. *A* has, therefore, no right of action.

Q. 'A' and 'B' two neighbours, each possessed a deep well on his own land. 'A' turned sewage into his well, in consequence whereof

the well of 'B' being at a lower level became polluted by underground percolation. 'B' sues 'A'. Is 'A' liable ?

Ans. Allowing sewage to escape into others' property is of itself an *injuria. A* is, therefore liable. (See *Ballard* Vs. *Tomlinson* (1885) 29 Ch. D. 115).

Q. 'A', the daughter of 'B', was acting as house-keeper to 'C'. 'A' was a minor at the time. Whilst in service she was sedeced by 'X'. At the time of seduction she had no intention of returning to her father's house ; but after seduction she went to her father's house and was maintained by him. Can 'B', the father, successfully sue 'X' for seduction ?

Ans. No. The daughter *A* was in *C*'s service at the time of seduction.

Q. State the remedies available with respect to tort.

Ans. **Remedies available with respect to tort**—The following remedies are available to a person with respect to tort :

I. Judicial Remedies, by way of—

- (i) damages, which may be contemptuous, nominal, substantial, or exemplary ; and
- (ii) injunction, which may be interim or temporay, perpetual or mandatory.

II. Extra-judicial Remedies, by way of—

- (i) Specific restitution of property ;
- (ii) Self-defence ;
- (iii) expulsion of trespasser ;
- (iv) re-entry on land :
- (v) recaption of goods ;
- (vi) abtement of nuisance ;
- (vii) distress damage feasant ;

Q. Certain jewellery belonging to a minor was entrusted with the Nazir for safe custody by an order of District Judge. The Nazir had to perform his duty in the manner laid down in the rules framed under Section 107, Government of India Act, 1915 and Section 122 of the Code of Civil Procedure. The Nazir commited a default in the performance of this statutory duty and was guilty of negligenee with the result that the jewellery was stolen. The minor after attaining majority sued the Government for the return of the jewellery or in the alternative for its value. Will he succeed ?

Ans. No. There is no vicarious liability of the Government for the wrong committed by its servants, while discharging its sovereign functions.

Q. In how many ways can a vested right to an action for tort be discharged ?

Ans. Discharge of a vested right to an action for tort — The vested right to an action for tort may be discharged in the following seven ways :—

(i) Death of either party.
(ii) Waiver.
(iii) Accord and satisfaction.
(iv) Release.
(v) Acquiescence.
(vi) Judgment recovered.
(vii) Statutes of limitation.

Q. 'A' is driving along a dusty road at a furious speed and the wheels of his car throw a little dust on the clothes of 'B', a pedestrian, which does no harm. 'B' brings an action against 'A'. Will he succeed ?

Ans. No. *A* is not liable. This is a case of *de minimis non cural* lex, which means that nothing is wrong of which a person of ordinary sense and temper would not complain. Section 95 of the Indian Penal Code recognises this principle. But an *infringement of a legal right* is not covered by this maxim.

Q. 'A's' widow and three children sued 'B' and 'C' for loss occasioned to them by 'A's' death caused as a result of collision between 'B's motor cycle and a motor car. 'A' was sitting on the pillion-seat of 'B's motor cycle driven by 'C' with knowledge and consent of and as agent of 'B'. 'C' was driving the motor cycle at an excessive speed and in a rash and negligent manner and in doing so, passed against the motor car coming from the opposite direction. In consequence of the resultant collision, 'A' was thrown off the pillion of the motor cycle at some distance with great force and sustained fatal injuries. 'B' disputed his liability for the negligence of 'C'. 'C' contended that he was not liable as it was at the request of 'A' that he took 'A' on the pillion seat of 'B's' motor cycle. Discuss the plaintiff's chances of success against 'B' and 'C'.

Ans. The plaintiffs will succeed as *volenti non fit injuria* is no defence to negligence. The maxim *volenti non fit injuria* means that an act is not actionable as a tort at the suit of any person, who has expressly or impliedly consented to it.

Q. 'A' gave permission to 'B' to cross his yard which was traversed by several routes. In a part of the yard was a hole which 'A' usually kept covered. One night 'A' uncovered it, and 'B' who was unprepared for its being uncovered, took the same route as usual and sustained damage from falling into the hole. Is 'A' liable for negligence ?

Ans. Yes, *A* is liable for negligence having created a dangerous condition. *B* is a licensee. The occupier is bound to ward the licensee against concealed danger actually known to the occupier. *A* being the occupier, failed to do so. *B* will, therefore, succeed against *A* for damages. (*See Blyth* Vs. *Topham*, (1607) Cro. Jac. 158).

Q. 'A' was the tenant of a flat in a block owned by the defendant landlords. 'A's' wife, who kept house for him in crossing the courtyard attached to the premises tripped over an irregularity in the surface and was injured. The wife sued the defendants. Are the defendants liable ?

Ans. The defendants are not liable, because the plaintiff kept house for her husband and was not an invitee. She is just a licensee. (*See Anderson* Vs. *The Guinnes Trust*,(1949) I. All. E. R. 530).

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LEADING CASES

CHAPTER XXVIII

LEADING CASES

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(1)

Cassidy

Vs.

Ministry of Health

[(1951) 2 KB 343]

Introduction—This case deals with the topic of negligence and involves the doctrine of *res ipsa loquitor*.

Facts of the Case—The plaintiff, a general labourer, was suffering in the early part of 1948 from a contraction of his third and fourth fingers. His panel doctor diagnosed as Dupuytren's contraction. He sent the plaintiff to Walton Hospital, Liverpool, where he was seen by a Dr. Fahrni, who was a whole-time assistant medical officer of the hospital. He confirmed the diagnosis and recommended an operation, which he personally performed on April 8, 1948. The operation involved in the ordinary course the hand and lower arm being kept rigid in a splint for about eight to fourteen days.

When the plaintiff's hand was finally released after some fourteen days, the condition of all the four fingers was very bad indeed. Both the fingers which had been operated on were bent and stiff and the trouble had affected the two good fingers, and after two unsuccessful manipulative operation all attempts to remedy the condition were abandoned.

The plaintiff in the present action alleged that he had been negligently treated after the operation. The Ministry of Health denied that Dr. Fahrni or any of the staff were guilty of negligence and denied that they were responsible for any negligence on the part of Dr. Fahrni. They brought Dr. Fahrni as third party, who denied negligence.

At the trial, Screatfield, J., gave judgment for the defendants on the ground that the plaintiff had failed to prove negligence on the part of any of the hospital staff. He gave no decision on the question whether Dr. Fahrni was a servant or agent of the Ministry, or whether the Ministry would be liable for his negligence. The plaintiff appealed.

Decision—Singleton, L. J. after reviewing the evidence observed that the conclusions at which he arrived were :—

(1) The *prima facie* case made on behalf of the plaintiff had not been displaced ;

(2) It was clear that there was negligence in regard to the post operational treatment ;

(3) It was not possible for the plaintiff to say that the negligence was the negligence of any particular individual : it might be that a number of people were at fault, or that lack of system was the cause. Everything was under the control of the hospital authorities, and those immediately concerned were in the employ of the corporation ;

(4) Responsibility lay upon the defendants. Even if it were shown that the whole of the trouble was due to negligence on the part of Dr. Fahrni—and that could not be said to be the position—responsibility would still lie upon the Ministry. They were answerable whether the negligence was that of Dr. Fahrni or of Dr. Ronaldson, or of the nursing staff ;

(5) No doubt the damage was increased by the leaving on of bandage and splint after a certain date but it was unnecessary to go into the question if responsibility for the whole of the damage lay upon the Minister.

The learned Judge was therefore in favour of allowing the appeal of the plaintiff, and he would order that judgment be entered for him, with damages to be assessed.

Denning, L. J., held that the hospital authority was liable for the negligence of professional men employed by the authority under contracts for services as well as under contract of service. The authority owed a duty to give proper treatment medical, surgical, nursing and the like—and though they might delegate the performance of that duty to those who were not their servants, they remained liable if that duty be improperly or inadequately performed by their delegates.

It was accordingly held that :

"The doctrine of *res ipsa loqiutor* applied, and the onus lay on the hospital authority to prove that there had been no negligence on their part or on the part of any one for whose acts or omission they were liable, and that onus had not been discharged. They nowhere explained how it could happen without negligence. They busied themselves in saying that this or that member of their staff was not negligent. They did not call a single person to say that the injuries were consistent with due care on the part of all the

> members of their staff. They called some of the people who actuallyt reated the man, namely Dr. Fohrni, Dr. Ronaldson and Sister Hall, each of whom protested that he or she was careful in his part ; but they did not call any expert at all, to say that this might happen despite all care. They had not therefore displaced the *prima facie* case against them and were liable to the plaintiff."

In the result the appeal was allowed.

(*Appeal allowed*).

(2)

Bourhill (*Hay*)
Vs.
Young
[1943 AC 92]

Introduction—This case involves a question regarding the liability of a person responsible for the noise of collision of motor vehicles due to his negligence, causing mental or nervous shock to another person working beyond the area of potential danger.

Facts of the Case—A motor cyclist while negligently driving at an excessive speed, collided with a motor-car and was killed. The appellant, a fish-wife, was standing about 45 feet from the point of impact on the far side of a stationary tramway-car from the platform of which she was unloading her baskets, she heard the noise although she did not see the accident, and suffered fright resulting in severe nervous shock which disabled her from carrying on her trade for some time, although she admitted at the time that she had no reasonable fear of immediate bodily injury to herself. At the time she was eight months pregnant and about a month later the child was still born, owing to the injuries sustained by her.

The appellant brought an action, claiming damages from the respondent, James Young, as executor-dative of the late John Young, the motor-cyclist. The lower Courts dismissed the suit. Then she went in appeal before the House of Lords.

Decisions—(1) The duty of the motor cyclist on the public road to other persons using it was to drive with such reasonable care as would avoid the risk of injury (including injury by shock although no direct impact occurred) to such persons as he could reasonably foresee might be injured by his failure to exercise that care.

(2) The appellant was not within the area of potential danger arising as the result of his negligence, and, accordingly he owed no duty to her and was not guilty of negligence in relation to her.

Judgment—(Per *Lord Thankerton*)—Following points may be observed from the judgment :

(1) The questiod is of the range of duty of a motorcyclist on the public road towards other passengers on the road. Clearly this duty is to drive the cycle with such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care. It was now settled that such injury includes injury by shock, although no direct physical impact or lesion occurs.

(2) If then the test of proximity or remoteness is to be applied, such a test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger, which would arise as the result of his negligence, and the question in the present case is whether the appellant was within that area.

(3) It was held that she was not. At the time of the collision with the motor-car he was well past the tramcar, and the appellant was not within the range of his vision. The risk of the bicycle ricochetting and hitting the appellant, was so remote that the cyclist would not reasonably be held bound to have contemplated it. There is no suggestion that the volume of the noise of the collision afforded any ground for argument. It is clear that the shock resulting to the appellant, situated as she was, not within the area of potential danger which the cyclist should reasonably have have had in view.

In the result it was held that the appellant had failed to establish that, at the time of the collision, the cyclist owed any duty to her.

Principles laid down—(1) It is necessary for the pursues in an action based on negligence to show that there was a duty owed to him by the defendants, because a man cannot be charged with negligence if he has no obligation to exercise diligence.

(2) The obligee in such a duty must be a person or of a class definitely ascertained, and so related by the circumstances to the obligator is bound, in the exercise of ordinary sense, to regard his interest and his safety. Only the relation must not be too remote, for remoteness must be held as general limitation of the doctrine. —(from *Ibid*).

(3) In view of the infinite variation of circumstances which may exist it is not possible or profitable to lay down any hard and fast principle, beyond the test of remoteness as applied to the particular case.

(*Appeal dismissed*).

(3)

Haynes
Vs.
Harwood & Xon

[L R (1935) IKB 146]

Introduction—This case deals with the subject of negligence and involves the doctrines of *onus actus interveniens* and *volenti non fit injuria.*

Facts of the Case—Defendant's servant drove a two-horse van to a wharf to unload goods, when he had finished unloading, he had to get a receipt, and instead of leaving the van where it was in the wharf-yard he led the horses out into the street and left them standing while he went back for the receipt. In the neighbourhood there were schools for young children. Two boys came down the street, and one of them threw a stone at the horses which caused them two run away.

The horses ran a considerable distance without any one interfering with them until they got opposite of the police station, where the plaintiff was in the charge of the room. Seeing what was happening, he came out into the street and there saw a woman who was in grave danger if nothing was done to rescue her ; he also saw a number of children who would be in grave danger if nothing was done by him to arrest the progress of the horses. At great risk to his life and limb, he seized the off side horse and tried to stop them both. He succeeded in doing so but at the cost of serious personal injuries entailing pecuniary loss.

The Trial Judge found the defendant to be negligent and the plaintiff obtained judgment for £ 350. The defendant appealed.

Judgment—*Firstly*, it was said that there was no evidence of negligence on the part of the defendant's driver :

Secondly, assuming there was some evidence of negligence, the accident happened through the intervention of some consciously acting persons between the wrongful conduct of the defendant's driver and the accident in other words, that there was a *novus actus interveniens*. and therefore the claim of causation between the cause of the accident, and the damage was broken and plaintiff's claim cannot be sustained ; and

Thirdly, that quite apart from, and independently of that question the plaintiff himself assumed the risk which he ran and took the risk upon himself, and therefore as the damage he suffered and was the result of his own act, he cannot recover (*volenti non fit injuria*).

Now, what is meant by negligence ? Negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim. In this case, if the duty was owed to, among others, the plaintiff if he is one of a class affected by the want of care or the negligence of the defendants, that is negligence of which the plaintiff can avail himself as a cause of action. In this case it was a failure to use reasonable care for the safety of those who were lawfully using the highway in which this van with the two horses attached was left unattended, and there is no doubt that a policeman—or indeed any one, and still more a policeman, using the highway for the purpose of stopping a runaway horse and thereby preventing serious accidents and possible preventing loss of life, is within the category of those lawfully using the highway. Hence the first point fails, of course, it does not follow that in all circumstances it is negligence to leave horses unattended in a highway : each case with all its circumstances had to be considered ; but the circumstances which make it quite clear that the defendant's servant was guilty of a want of reasonable care in leaving his horses unattended are that this was a crowded street in which many people, including children, were likely to be at the time, when, the horses were left and before the defendant's servant could get back to them. To leave horses unattended, even for such a short time as 3 minutes, in a place where mischievous children may be about, where something may be done which may result in the horses running away, seems to us to be negligent, having regard to the circumstances.

In *Lynch* Vs. *Nurdin* (1841, 1 QB 29), the facts were these :

> "The defendant left his horses and care in the roadways, where he had a right to leave it. In the road where the defendant left his cart there were a number of children who began to play with the horse and the cart ; one of them jumped on the cart ; another of them wrongfully set the horse in motion whereby the plaintiff, who was the child on the cart, was injured. Undoubtedly there was there a *novus actus interveniens—viz.*, the misconduct of the boy who started the horses ; but it was held that nonetheless the accident, and the damage, could be treated as a result of the defendant's wrongful act because it was to be anticipated that children would do mischievous things, and that any one who invites or gives an opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong but that it was done by the mischievous children. There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were proba-

> ble ; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of wrongful act.

As to the third ground, Prof. Goodhart, in Cambridge Law Journal, p. 12, Vol. holds that :

> "The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty."

Their Lordships admit that this also represents the law of England. In *Cutler* Vs. *United Dairies* (London) Ltd. (1933, 2 KB 297), Scrutton, L. J., held :

> "A horse bolts along the highway, and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances ? On those facts it seems to me that he is not. The damage is the result of the accident. The man who was injured, in running out to stop the horse, must be presumed to know the ordinary consequences of his action, and the ordinary and natural consequence of a man trying to stop a runaway horse is that he may be knocked down and injured. A man is under no duty to do an act the ordinary consequence of which is that damage may ensue ; the damage must be his own head and not that of the owner of the horse".

Their Lordships however think that it is expressed, unfortunately too widely and has led to a misunderstanding :

> "We agree to this extent, that the mere fact of a spectator running out into the road to stop a runaway horse will not necessarily entitle him to succeed in an action for the consequential damage. All the circumstances must be considered, and if his act is one which everybody would expect from a normally courageous man, doing what he does in order to protect other people, we do not think the observation of Scrutton, L. J., accurately represents the law of this country. He (Scrutton, L. J.) preferred to put his judgment on the other principle, that the rule as to *novus actus interveniens* applied. It obviously did apply in that particular case, but it does not follow that it applies in every case because it applied in that particular case."

(*Appeal dismissed*)

(4)

Century Insurance Co.

Vs.

Northern Ireland Transport Board

[1942 AC 509]

Introduction –This case deals with the question whether an employee becomes the servant of a third party which under a contract with his employer hires the services of the employee. It also deals with a question regarding the liability of an employer for the negligent act of his servant.

Facts of the Case—The respondents were insured by the appellant company under Section 11 of a policy of insurance against liability to third parties arising from damage to property caused by the use by them of a petrol tanker belonging to the respondents, on August 2, 1937, this tanker, which was being driven by their employee, one Davison, had taken on board a consignment of three hundred gallons of petrol at the Larne Depot of Holmes, Mullin & Dunn, Ltd., for delivery into the storage tank of one Catherwood, a garage proprietor of Belfast.

Davison drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hosepipe into the manhole of Catherwood's tank and turned on the stopcock at the side of the tanker. While the petrol was flowing from the tanker into the tank, Davison lighted a cigarette and threw away the lighted match. The match ignited some material on the floor of the garage and a fire was caused forthwith where the nozzle of the delivery hose was discharging into the tank. Catherwood seized a fire-extinguisher and started to play it on the fire which appeared at the manhole at the same time shouting to Davison to turn of the stopcock. Davison did not do so, or attempt to do so, but started up the tanker and drove it out of the garage until the fore wheels had about reached the water channel in the street.

Davison then stopped the tanker and jumped to the ground. The fire although extinguished at the manhole by Catherwood, persued the trailing hose and the escaping petrol, and Davison had barely reached the ground when a very violent explosion occurred. The explosion destroyed the tanker, the motor car of Catherwood which was parked in the street, and also damaged several houses which were the property of other parties. The claims in respect of the motor and houses were settled for £ 1,001 16s. 7d. ; which was paid by the appellants without prejudice to their ultimate rights, but they contended that they were not liable. One of the grounds on which the appellants resisted the claim of the respondents under the policy was that, in view of the terms of an agreement of October 11, 1934, between the respondents' predecessors, the Irish Road

Transport Co. Ltd. whose, undertaking they acquired on April 30, 1937, and Messrs. Holmes, Mullin & Dunn Ltd., the liability for the damage did not rest on the respondents. By Clause I of this agreement the respondent, when resquested to do so by Holmes, Mullin & Dunn, Ltd., were bound to deliver petroleum spirit which Holmes, Mullin & Dunn, Ltd., had for digposal to any destination within N. Ireland.

The delivery was to be by tank lorries at an agreed scale of freights. The lorries were to be loaded at the installation of Holmes, Mullin & Dunn, Ltd , at Larne, and the respondents were to keep sufficient tank-lorries at Larne to transport all the spirit which might be given to them for delivery. The respondents were to keep the spirit, while in transit, issured against fire and spillage and were to dress all their employees engaged in such delivery in such uniforms at Holmes, Mullin & Dunn, Ltd., might direct.

The respondents undertook to effect all necessary insurances under the Workmen's Compensation Acts and to be accountable to Holmes, Mullin & Dunn Ltd., for the product entrusted to them for delivery. The clause of the agreement mainly relied on by the appellants as establishing that, at the time of the accident, Davison was the servant, not of the respondents, but, of Holmes, Mullin & Dunn, Ltd., was clause 9, which provided that all the employees of the respondents engaged in or about such delivery should accept and obey the orders of Holmes, Mullin & Dunn, Ltd., "regarding such delivery, the payments of accounts and all matters incidental thereto", and that the respondents should dismiss any employee "disregarding or failing to obey such orders".

Then followed the proviso that nothing contained in clause should be taken as implying that such employees were, in any way, the employees of Holmes, Mullin & Dunn, Ltd. The dispute whether the appellants were liable under the policy was referred to the arbitration of Mr. Lawry K. C., who stated his award in the form of a special case. The relevant questions formulated in the special case were :

(1) Was Davison at the time of the accident acting as the servant of the respondents or of Holmes, Mullin & Dunn, Ltd.,

(2) Was the admittedly careless act of Davison in lighting a cigarette and throwing the match-stick on the floor of garage an act done in the course of his employment as such servant, for the consequences of which his master was responsible ?

The arbitrator, subject to the special case, answered the first question by saying that at the time of the accident Davison was acting as the servant of the respondents and the second question in the affirmative. Brown J., before whom the special case came was of a different opinion as regards the first question, and held that Davison was, at the relevant moment, the servant of Holmer, Mullin & Dunn Ltd. The Court of Appeal reversed the decision of Brown J., and upheld the answers arrived at by the arbitrator. The appellants appealed to the House of Lords.

Decision—In appeal, the House of Lords held that :

(1) The contract did not contemplate any transference of servants as contrasted with transference of service, and the driver at the time of the accident was acting as the servant of the respondants ; and

(2) The careless act of the driver was done in the course of his employment so that the respondents were responsible for the consequences, and accordingly, entitled to be indemnified under the policy.

Judgment—(Per *Viscount Simon L. C.*) Two questions were to be considered :—

(1) Was the driver at the time of the accident acting as the servant of the respondents or of the Petroleum Company, and

(2) Was the admittedly careless act of the driver in lighting a cigarette and throwing the match on the floor of the garage an act done in the course of his employment as such servant, for the consequences of which his master was responsible.

Replying these questions, His Lordship observed as follows :

(1) As to the first question, it was observed that the position of the respondents, under the contract is not that of people who end vehicles and drivers for the hirers to direct, but of independent contractors who undertake by the use of their own vehicles and by the activities of their own servants to produce the resulting *i. e.*, the deliveries, as ordered here by the Petroleum Company. His Lordship approved the observation of Andrews C. J. in the Court of Appeal that the provisions of the agreement point irresistibly to the conclusion that the agreement was one of carriage and delivery to be performed by the predecessors of the respondents with their own servants. It was not a contract for the hiring out of lorries and men, or of lending them to the Petroleum Company, to enable them to effect delivery.

(2) On the second question it was observed that the driver was serving his master when he put the nozzle into the tank and turned on the top. Admittedly, he would be serving his master when he turned off the tap and with-

> drew the nozzle from the tank. In the interval spirit was flowing from the tanker to the tank, and this was the very delivery which the respondents were required under their contract to effect. The Driver's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, 'they also serve who only stand and wait'. He was presumably close to the apparatus, and his negligence in starting smoking and in throwing away a lighted match at that moment is plainly negligence in the discharge of the duties on which he was employed by the respondents.

In the result the appeal was dismissed.

Principles laid down—(1) The man is to obey the directions of the person with whom his employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position, the man who receives directions from the other person does not receive them as a servant of the person, but receives them as servant of his employer.

(2) The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and, at least, generally speaking not for his employer's benefit, but that last condition is no longer essential to fix liability on the employer. Nor is such an act *prima facie* negligent. It is in itself both innocent and harmless.

The negligence is to be found by considering the time when and the circumstances in which the act in question is done. The duty of the workman to his employer is so to conduct himself in doinge his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act.

(*Appeal dismissed*).

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(5)

Benham

Vs.

Gambling

[1941 I All ER 7]

Introduction—Since the decision in *Rose* Vs. *Ford*, 1937 A. C. 826, one of the heads of damage in an action for personal injuries where the injuries have resulted in death has been a claim for loss of expectation of life. The assessment of such damages has been the subject of much discussion but this case has now settled the controversy and laid down the principles for the assessment of such damages.

Facts of the Case—The action arose out of a motor car accident. The respondent was the father, and was constituted the administrator of the estate of an infant, who at the time of the accident was two-and-a-half years old. The appellant, in attempting to drive his car past another car in which this infant was one of the passengers, caused the latter car to overturn and the infant was so severely injured that he died on the same day.

At the trial, the negligence of the appellant was admited, and the only question for the judge to decide was the amount of damages to be awarded to the administrator for the benfit of the child's estate. Since the child was unconscious from the moment of the accident till his death, there could be no claim for pain and suffering, and the only, apart from funeral expenses, was that of damages arising from the demunition of the child's expectation of life.

The Judge fixed the damages at the sum of £ 1,200 having arrived at the conclusion that this amount would, in the circumstance, be neither unreasonably excessive nor unreasonably deficient. The defendant appealed to the Court of Appeal where by a majority decision, the damages were confirmed. Then an appeal was preferred to the House of Lords.

Decision—In the circumstance of the case, £ 200 is the proper sum to be awarded as damages.

Judgment—Under the Common Law of England, it was the general rule that no executor or administrator could sue, or be sued, for any tort committed against or by the deceased in his lifetime. Such was the actual purport of the maxim *actio personalis monitur cum persona*, a maxim which is both obscure in origin and inaccurate in expression, for the proposition that personal actions abate with the death of either party is, of course, not true generally speaking of causes of action arising out of contract.

The Common Law rule was subject to important exceptions, some of them admitted by the Common Law itself and others introduced by statute, but the rule itself was in effect swept away by the Law Reform (Miscellaneous Provisions Act. 1934), which provides subject to important exceptions, that on the death of any person after the commencement of the Act, all causes of action vested in him shall survive for the benifit of the estate. His claim can be enforced in an action brought by his personal representative.

It has been recognised by Judges that the measurement of damages for the loss of expectation of life in terms of money is a very difficult matter. The right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from vast mass of vital statistics. The figures is not necessarily one which can be properly attributed to a given individual. In any case, the thing to be valued is not the prospect of lengh of days, but the prospect of a predominantly happy life.

The age of the individual may, in some cases, be a relevant factor but as arithmetical calculations are to be avoided if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to paid to the deceased's state, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that make up 'life's fitful fever'—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculate solely, or even mainly, on the basis of the length of life which is lost.

Before damages are awarded in respect of the shortened life of a given individual, it is necessary for the court to be satisfied that the circumstance of the individual life were calculated to lead, on balance to a positive measure of happiness of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to future of unhappiness or despendency, that would be a circumstance justifying a smaller award.

In assessins damages, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on an objective esimate of what kind of future on earth the victim might enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.

The main reason why the appropriate figure of damages should be reduced in the case of very young child is that there is necessary so much uncertainly about the chid's future that no confident estimate prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree attained so an established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable.

In the case of a child as in the case of an adult, there is no reason why the proper sum to be warded should be greater because the social position or prospets of wordly possession are greater in one case than another. The degree of happiness to be attained by a human being does not depend on wealth or status.

The truth is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived the jury or Judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead to the conclusion that, in assessing damages whether in the case of a child or an adult, very moderate figure should be chosen. The Lordships believed that the proper figure would be £ 200.

Principles laid down—(1) The measurement of damages for the loss of expectation of life' in terms of money is a very difficult matter. The right conclusion is not to be reached by applying what may be called the statistical or acturial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from vast mass of vital statistics. The figure is not necessarily one which can be properly attributed to a given individual. In any case the thing to be vatued is not the prospect of length of days, but the prospect of a predominantly hapyy life.

(2) Before damages are awarded in respect of the shortened life a given individual, it is necessary for the court to be satisfied that 'the circumstances of the individual life were calculated to lead, on balance to a positive measure of happiness of which the victim has been deprived by the defendant's negligence.

(3) In assessing damages, the question is not whether the deceased has the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not.

(4) The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made.

(*Damages reduced*).

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(6)

Read

Vs.

Lyons and Co., Ltd.

[1947 AC 156]

Introduction—This case deals with a question regarding the liability on the part of an occupier for personal injury caused by an explosion to a person lawfully on premises, when there is no negligence averred or proved against the occupier and cause is also unknown. It also explains as to when the rule in *Ryland* Vs. *Fletcher* will apply.

Facts of the Case—The appellant, who was employed as an inspector of munitions by the Ministry of Supply' was injured in the course of her duties, while in a munitions factory operated by the respondents, by the explosion of a high explosion shell during the process of manufacture. The explosion was not alleged to be due to any negligence on the part of the respondents who were operating the factory under a contract with the Minister of Supply' by the terms of which they were declared to be the agent of the Minister. The appellant who was registered under the National Service Acts, had been directed to her work as an inspector by the Labour Exchange.

The appellant sued the respondents for damages for personal injuries. The respondents pleaded that the appellant voluntarily incurred the risk of explosion as a risk incidental to her employment and the statement of claim disclosed, no cause of action. The trial Court held the respondents liable. The Court of Appeal reversed this decision. The appellant then appealed to the House of Lords.

Decision—The respondents were not liable to the appellant in damages, since there had been no escape of any dangerous thing from their premises and accordingly an essential condition for the application of the rule in *Rylands* Vs. *Fletcher* was wanting.

Judgment—(Per *Viscount Simon*). The plea of *volenti non fit injuria* had been expressly withdrawn before the House by the respondents. The simple question was—whether in circumstances of the case the respondents were liable, without any proof or inference that they were negligent, to the appellant in damages for her injuries ? The answer was in the negative. During the course of the judgment following observations were made—

(1) A person on the premises, had, in the absence of any proof of negligence, no cause of action, and that there must be an escape of the damage—causing thing from the premises and damage caused outside before the doctrine customarily associated with the case of *Rylands* Vs. *Fletcher* can apply. (Observed by Court of Appeal). His Lordships agreed with this decision.

(2) The appellant was a person present in the factory in pursuance of public duty and was consequently in the same position as an invitee. The respondents were managers of the factory as agents for the Ministry of Supply and had the same responsibility to an invitee as an ordinary occupier in control of the premises. The duties of an occupier of premises to an invitee have been analysed in many reported cases, but in none of them, there is any hint of the proposition necessary to support the claim of the appellant in this case. The fact that the work that was being

carried on was of a kind which requires special care is a reason why the standard of care should be high, but it is no reason for saying that the occupier is liable for resulting damage to an invitee without any proof of negligence at all.

(3) The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape, (Rule of *Raylands* Vs. *Fletcher*). Thus *Rylands* Vs. *Flecher* is conditioned by two elements—

(i) condition of 'escape' from the land of something likely to do mischief it escapes ; and

(*ii*) condition of 'non-natural use' of the land.

It is not necessary to analyse the second condition on the present occasion, for in the case before us the first essential condition of 'escape' for the purpose of applying the proposition in *Rylands* Vs. *Fletcher* means escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control. There is no escape of the relevant kind at all the appellant's action fails on that ground.

(4) Had there been a question—Whether the making of munitions in a factory at the Government's request in time of war for the purpose of helping to defeat the enemy is a 'non-natural' use of land adopted by the occcpier, for his own purposes' it would have been replied on the negative.

Principles laid down—Rule of *Rylands* Vs. *Flectcher*. (see point 3 in the judgment above) does not apply if the conditions of 'escape' of any dangerous thing and non-natural use' of land are not satisfied.

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(7)

St. Helen's Smelting Co.

Vs.

Tripping

[(1865) II HLC 642, 145 RR 348]

Introduction—This case deals with the liability for nuisance resulting in any injury to property. It is a leading instance where damages and injunction were granted against the owner of a Copper

Smelting Factory from which noxious fumes escaped and caused trees and shrubs in the plaintiff's property to wither.

Facts of the Case—This was an action brought by the plaintiff to recover from the defendants damages for injuries done to his trees and crops, by their works. The defendants were the directors and shareholders of the St. Helen's Copper Smelting Company Ltd. The plaintiff in 1860, purchased a large portion of the Bold Hall Estate within a short distance of which stood the works of the defendants.

The declaration alleged that ;

"The defendants erected, used, and continued to use, certain smelting works upon land near to the said dwelling house and lands of the plaintiff, and caused large quantities of noxious gases, vapours, and other noxious matters, to issue from the said work, and diffuse themselves over the land and premises, of the plaintiff whereby the hedges, trees, shrubs, fruit, and herbage were greatly injured ; the cattle were rendered unhealthy and the plantiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed and also the reversionary lands and premises were depreciated in value."

The defendants pleaded not guilty.

At the trial the judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbour ; but that the law did not regard trifling inconveniences ; everything must be looked at from a reasonable point of view, and therefore in the case of an alleged injury to property, as from noxious vapours from a manufactory, the injury to be actionable must be such as visibly to diminish the value of the property, that locality, and all other circumstances must be taken into consideration, and in countries where great works have been and were carried on, parties must not stand on extreme rights.

The defendant's counsel submitted that the three question which ought to be left to the jury were:—

(1) Whether it was a necessary trade,

2) Whether the place was a suitable place for such a trade, and

3) Whether it was carried on in a reasonable manner.

Thereupon the judge asked the jury whether the enjoyment of the plaintiff's property was sensibly diminished, and the answer was in the affirmative. Whether the business there carried on was an ordinary business for smelting copper, the answer was, "we consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was "we do not". The verdict was therefore for the plaintiff and the damages were assessed.

The defendants then appealed to the exchequor chamber, where the above judgment was confirmed. This appeal was then brought.

Judgment—It is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, *viz.*, the personal inconvenience and interference with one's enjoyment, one's quite, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance. must depened greatly on the circumstances of the place where the thing complained of actually occurs. It a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of properperty, and for the benefit of the inhabitants of the town and of the public at large.

If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there definitely arises a very different consideration. In a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to the circumstances the immediate result of which is sensible injury to the value of the property.

The appellants contended that the whole neighbourhood where these copper smelting works were carried on, is a neighbourhood more or less devoted to manufacturing purposes of a similar kind, and, therefore, inasmuch as this copper smelting is carried on in a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable dimunition, of the value of the plaintiff's property.

Their Lordships hold that it is not the meaning of the word "suitable", or the meaning of the word "convenient" which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which may be injury and destruction to the neighbouring property. Of course, cases are to excepted where any prescriptive right has been acquired by a lengthened user of the place.

Principles laid down—(1) There is a distinction between an action for a nuisance in respect of an act producing a material injury to the property, and an action brought in respect of an act productive of sensible personal discomfort. With regatd to the latter, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must depend greatly on the circumstances of the place where the thing complained of actually occurs.

(2) If a man is a resident of a town, it is essential that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man is living in a street having numerous shops, and a shop is opened next door to him, being carried on in a fair and reasonable way, he has no ground for complaint, because to him-self individually there may arise much discomfort from the trade carried on it that shop. But when an occupation is carried on by one person in the neighbourhood of another and the result of that trade or occupation, or business is a material injury to property, then there definitely arises a very different consideration.

(3) In a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours will not apply to the circumstances, the immediate result of which is sensible injury to the value of the property.

(Appeal dismissed).

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(8)

Sedleigh-Denfield

Vs.

V. *O. Gallaghan*

[LR (1940) AC 880]

Introduction—This case involves a question regarding a private nuisance by allowing the rainwater to overflow on the premises of another.

Facts of the Case—On the raspondent's land was a ditch in which at a later date was placed a pipe or culvert for carrying off rain water, the pipe not being laid by the respondents, or with their knowledge or consent, and thus by a trespasser. They, however, subsequently became aware, through their servents of its existence and they in fact used it for the draining of there fields. To prevent leaves or other matter blocking the opening of the pipe, a greating was places, not at some little distance from its opening where it would have been effective, but on the top of the pipe itself, with the consequence that during a heavy rainstorm the pipe became choked with leaves, so that the water over-flowed on to the appellants premises causing damage in respect to which he claimed to recover damages.

The Lower Court dismissed the suit of the plaintiff who, thereupon, appealed to the House of Lords.

Decision—The respondents must be taken to have had knowledge of the existence of the unguarded pipe on their land, notwithstanding that it was placed there by a trespasser, and, consequently, they were responsible for the damage caused to the appellant.

Judgment—(Per *Viscount Mougham*). The defence was that the respondents never consented to the making of the culvert as a substitute, for a part of the ditch and were ignorant of its existence. This defence failed, due to the following observation of his Lordship:

(1) All that is necessary, is to show that the owner or occupier of the land with such a possible cause of nuisance upon it knows or must be taken to know of it. An absentee owner or an occupier obvious of what is happening under his eyes is in no better position than the man who looks after his property including such necessary adjuncts to it as hedges and ditches.

On this view as to the knowledge or presumed knowledge of the respondents the first question was whether the respondents were under a *prima facie* liability as regards the appellant if the ditch overflowed owing to the culvert becoming blocked with the result that the appellant's land suffered from an overflow of water from the ditch ? The appellant contended that the respondents are liable for a private nuisance for which they are responsible. His Lord ship in the circumstances of the case observed that there is ample authority that the respondents are liable as for a nuisance in case of the flooding of the appellant's premises. His Lordship, dicus ing the case law quoted the principle in *Broder* Vs. *Saillard*, 2 Ch. D 692. That runs as follows :

(2) If auyone by artificial erection on his own land causes water even though arising from natural rainfall only, to pass into his neighbour's land and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured.

The main defence of the respondent was that the erection of the culvert with its lack of any proper contrivance for preventing it from becoming blocked with leaves and refuse was an act of trespass—without the permission or knowledge of the respondents and that they are, therefore, free from liability. His Lordship as regards this defence quoted a passage from Salmond's Low of Torts.

(3) 'When a nuisance has been created by the act of a trespasser or otherwise without the act, authority or permission of the occupier, the occupier is not responsible fore that nuisance unless, with knowledge or means of knowledge of its existence he suffers it to continue without taking reasonably prompt and efficient means for its abatement'.

(4) An occupier of land 'continues a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He 'adopts' a nuisance if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance.

His Lordships, considering these two propositions (*viz* No. 3 and 4), observed as follows :

> "The respondents both continued and adopted the nuisance. After the lapse of nearly three years they must be taken to have suffered the nuisance to continue ; for they neglected to take the very simple step of placing a grid in the proper place which would have removed the danger of their neighbour's land. They adopted the nuisance for they continued during all that time to use the artificial contrivance of the conduct for the purpose of getting rid of water from their property without, taking the proper means for readering it safe".

(*Appeal allowed*).

* * *

(9)

Mohammad Amin

Vs.

Jogendra Kumar Banerjee

[(1947) 74 IA 193]

Introduction—This case deals with the topic of malicious prosecution and lays down as to at what is the stage at which an action for damages is founded.

Facts of the Case—In March 1940, an agreement was entered into between the appellant and the first respondent which was contained in certain letters whereby the appellant agreed to sell certain property to a company which was to be formed by the first respondent. The appellant alleged that subsequently an oral agreement was made between himself and the first respondent containing certain provisions which went beyond the written agreement. The third respondent company was incorporated on April 16, 1940 to carry out the purchase from the appellant, and certain property was transferred by the appellant to such company. Subsequently, the appellant took the view that the terms of the oral agreement which he had made with the first respondent had not been carried out, and accordingly he refused to transfer the rest of the property included in the sale to the company.

On September 16, 1940 the second respondent, acting on behalf of all the three respondents, filed a petition of complaint against the appellant in the Court of the Sealdah Police Magistrate, under the provision of Section 190, Cr. P. C. The petition after setting out the facts of the dispute, alleged that as the accused had refused to deliver the remainder of the properties agreed to be sold, he had committed an offence under Section 422 of the Indian Penal Code, or Section 406 of the Code in the alternative, and asked that he might be summoned to answer the said charge. The magistrate duly registered the charge under Section 420, I. P. C. and forwarded to a Mr. N. N. Mukerji for inquiry and report under Section 202 of the Code,

Mr. Mukerji, by a letter dated September 2?, 1940 gave the appellant notice that a criminal case had been instituted against him by the second respondent, that it had been referred to the writer for enquiry, and that the inquiry would be held on October 25. For some reason, however, Mr. Mukerji did not hold the inquiry and ultimately the magistrate himself held the inquiry in an open court. At such inquiry the first respondent deposed that "we have brought this case for cheating us against Mohammad Amin".

On December 3, 1940 after the completion of the enquiry, the magistrate made an order that it was no case of cheating, and hence nocriminal case of any nature could be made out by the complaint. He thereupon dismissed the complaint under Section 203 of the Lr. P. C.

On June 26, 1941, the appellant filed this suit against the respondents. The plaintiff claimed certain reliefs arising out of the civil dispute with the respondents, but that part of his action was dismissed by the trial judge and was not the subject of appeal. The claim, relevant to this appeal, was for Rs. 28,500 for damages for malicious prosecution, made up of costs incurred in his defence to the inquiry, damage to business and damage to reputation. The case was tried on the original side of the High Court by Gentle J., who held that there was no reasonable and probable cause for the criminal proceedings taken by the respondents, that there was not the slightest justification for filing a criminal complaint, and that the respondents were actuated by malice.

The learned judge, however, held that the plaintiff's suit failed since there had been, in law, no prosecution. He only awarded Rs. 1000 as costs to which the appellant had been put in connection with the filing of the complaint. From this decree the plaintiff filed an appeal, but the appeal was dismissed.

Appeal was now made to the Privy Council.

Judgment—The first question is whether in Golap Jan's case (I. L. R. 38 C. 880) the correct principle was applied. The Courts below held it as the correct principle and based their judgment upon it. In. that case a complaint had been made before a Magistrate by the defendant against the plaintiff of criminal breach of trust and the Magistrate had referred the matter for inquiry by the police under Section 202 of the Criminal Procedure Code, and, on receiving the report of the police, dismissed the complaint under Section 203 of the Code. The Court held that in those circumstances no prssecution had commenced and accordingly no suit for prosecution would lie. Reliance was placed by the Court on the heading to Chapter 17, "The Commencement of Proceedings before Magistrates" and it was held that stage had never been reached. The Court also relied on *Yates* Vs. *The Queen*, (1885, 14 Q B. D. 648) where it was held that a prosecution could not be said to have commenced before a person was summoned to answes a complaint.

However, in 1912, in *C.H.* Vs. *Crowdy L.O. Reilly*, the Calcutta High Court exprssed the view that a suit for damages for malicious prosecution law whenever the Criminal Law had been set in motion maliciously and without reasonable cause, and that it was not necessary to show that there had been a prosecution in the restricted sense used in the Criminal Procedure Code. In 1914, *Bishun Prasad Narain Singh* Vs. *Phulman Singh*, came before the Calcutta High Court.

In that case the complainant charged the plaintiffs with certain acts of a criminal nature and prayed that security might be taken from them, as otherwise his life and property would be in danger. The Magistrate examined the complaint and sent it for inquiry and report. The Deputy Magistrate, in due course, submitted his report and the Magistrate thereupon refused to proceed with the complaint.

The Court, following their former decision, held, that proceedings under Section 107 amounted to a prosecution for the purposes of a suit for malicious prosecution and in this case the prosecution had commenced ; in their view, the prosecution commenced when the prosecutor had taken the initial step, *viz.*, had made his complaint to the Magistrate.

The decision of this case was followed by the same High Court in later decisions in 1922 and 1928, and by the Oudh Chief Court in 1927 in *Gur Saran Das* Vs. *Israr Haider*. On the other hand, Golad

Jan's case had been followed by the Patna, Allahabad and Rangoon High Courts. It will thus be necessary to examine the principles on which Golap Jan's case was based.

Under the English Law of malicious prosecution, the foundation of the action lies in abuse of the process of the Court by wrongfully setting the law in motion ; the plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour, and that he had suffered damage. Damages might be claimed for damage to the per on, property or to reputation. That the word "prosecution" in the title of the action is not used in the technical sense which it bears in Criminal Law, is shown by the fact the action lies for the malicious prosecution of certain classes of civil proceedings, for instancce, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company (*Quartz Hill Consolidated Gold Mining Co.* Vs. *Eyre*, 1883, 11 Q. B. D. 674).

The reason why the action does not lie for falsely and maliciously prosecuting the ordinary civil action is that such a case does not necessarily and naturally involved damage to the party sued. *A* civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared of any imputations made against him, and he will be indemnified against his expenses by the award of costs against his opponent.

The law does not award damages for mental anxiety, or for extra costs incurred beyond those imposed on the unsuccessful party. But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage, and in such a case damage to reputation will be presumed.

To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution ; the test is whether such proceeding have reached a stage at which damage to the plaintiff results.

Their Lordships do not agree that the mere presentation of a false complaint which first seeks to set the Criminal Law in motion will *per se* found an action for malicious prosecution. If the Magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccesful attempt to set the Criminal Law in motion, and no damage to the plaintiff results. But in this case the Magistrate took cognizance of the complaint, examined the complaint on oath, held an inquiry in open Court under Section 202 which the plaintiff attended, and at which he incurred costs in defending himself.

The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial, the plaintiff is entitled to judgment.

(*Appeal allowed*).

(10)

Subbiah Reddy

Vs.

Jordon

[(1945) 72 IA 206]

Introduction—This case deals with the measure of damages awarded for some negligent act causing injuries, and the variation of the amount by an appellate court.

Fact of the Case—The respondent who, was a motor engineer and salesman, was negotiating for a position in International Motors, Bangalore, a concern owned by appellant No. 1 in which appellant No. 2 was employed. In a morning, whilst the draft of a proposed agreement between the respondent and the firm was being typed, appellant No. 2 took the responddent out in a Skoda car to demonstrate the performance of the car. In the course of the drive there was an accident due to the failure of appellant No. 2, who was driving, to notice an obstruction across the road in time to avoid it. The car overturned, and the respondent's left arm was severely injured, and eventually had to be amputated below the elbow.

The plaintiff (respondent) brought an action for damages for injuries sustained by him in an accident. He sued Anniah Reddy, the first defendant and second appellant, who was the driver of the car and his father Subbiah Reddy, the second defendant and original first appellant, who was the owner of the car. Subbiah died later on. The trial Judge passed a decree against appellant No. 2 for Rs. 12,500 for damages, but dismissed the suit against appellant No. 1.

In appeal the Additional Judge increased the value of damages to Rs. 25,000 and reversed the decree, that dismissed the suit against appellant No. 1. In the result he passed a decree against both appellants for Rs. 25,000 and costs. Then the appellants went in appeal before the Privy Council.

Decision—Held that both the appellants were liable. But the Additional Judge was not justified on the materials before him in awarding so large a sum of Rs. 25,000 but, on the other hand, the trial judge did not give sufficient weight to the evidence of actual loss of earning capacity by the plaintiff. Rs. 15,000 is a fair sum of which to assess the damages.

Judgment—The Privy Council accepted the finding by both the lower courts that the accident was caused by the negligence of appellant No. 2. The decision of the Additional Judge that appellant No. 1 was liable, was also affirmed. The car in which the accident occured belonged to him, and was used in connection with his business. The only question that required consideration was that of damages. As to this, the following observations were made :

(1) The full rigour of the rule acted upon by the court of Appeal in England, and stated in *Flint* Vs. *Lovell* (1935) IKB 354 by the Court of Appeal does not apply. The rule is—"The court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

(2) An appeal Court in British India should never interfere arbitrarily and without good reason with the decision of the lower court, and on questions of fact the advantage which the trial judge enjoys in having seen the witnesses, and sometimes in knowledge of local conditions, must always be recognized, but where such considerations do not operate, an appeal court is entitled and, indeed, bound, to give effect to its own view on matters within its competence.

(3) Their Lordships thought that the Additional Judge was not justified on the materials before him in awarding so large a sum of Rs. 25,000 but on the other hand, that the trial judge did not give sufficient weight to evidence of actual loss of earning, capacity by the plaintiff. In their Lordship's view Rs. 15,000 is a fair sum at which to assess the damages.

The decree of the Additional Judge was varied by reducing the sum decreed from Rs. 25,000 to 15,000. In other respects the decree would stand.

(*Decree varied to amount*).

(11)

Lumely

Vs.

Gye

[118 ER 74]

Introduction—This case deals with a wrong done knowingly to induce a person to commit a breach of contract, which he has entered into with another, who, in consequence suffer damage, and lays down that it is an actionable wrong.

Facts of the Case—The plaintiff was lessee and manager of the Queen's Theatre for performing operas for gain to him. He had contracted and agreed with one Johanna Wanger to perform in the theatre for a certain time, with a condition amongst others, that she should not sing nor use her talents elsewhere during the term without plaintiff's consent in writing.

The defendant, knowing the promises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, whilst the agreement with Wanger was in force, and before the expiration of the term, enticed end procured Wanger to refuse to perform and depart from the employment of the plaintiff. Accordingly she did depart out of the employment and service of the plaintiff.

The plaintiff sued the defendant for damages.

Decision—The defendant maliciously procurred Miss-Wanger, who was under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured. Hence judgment for the plaiutiff.

Judgment—It is clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. The rule applies whenever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue, and the relation of master and servant subsists, sufficiently for the purpose of such action during the time for which there is in existence a binding contract of hiring and serivce between the parties.

It is a fanciful and technical and unjust distinction to say that not having actually entered into the service, or that the service not actually continuing, can make any difference. The worng and injury are surely the same, whether the wrongdoer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cubleage on the first morning of his service. His Lordships was sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority that shows these actions to be maintainable for receiving or harbouring servants after they have left the actual service of the master.

The objection as to the actual employment not having commenced would not apply in the present case to the court which states that Miss Wagner had become the artist of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment or service, in the present case was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual role of law giving a remedy in case of enticing away servants.

The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case ot master and servant, there is no reason for confining the case to service or engagements under contracts for services of any particular descriptions, and the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or services for a given time under the direction of a master or employer who is injured by the wrongful act, more especially when the party is bound to give such personal services exclusively to the master or employer, though his Lordship did not say that the service need be exclusive.

In this class of cases it must be assumed that is is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant and it would seem unjust, and contrary to the general principles of law, if such wrongdoer were not responsible for the damage caused. by his wrongful and malicious act.

It is justified in applying the principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured.

Principles laid down—A person who wrongfully and maliciously, or, which the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law.

(*Judgment for plaintiff*).

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(12)

Parvathi
Vs.
Manner

[8 Mad. *175*]

Introduction.—This case deals with the question whether an action for damages for slander can be maintained without proof of special damages in cases in which it would not be allowed in English Courts.

Facts of the Case--Parvathi Ammal, the plaintiff sued the defendant, Manner Ayyar, for Rs. 1,000 damages. She alleged that on the 29th June, 1881, the defendant, with the intention of defaming her publicly abused her in the presence of the village Munsif and others, by falsely declaring that she was not the legally married wife of her hushand, but a waman, who had been elected from several places for unchastity, and that her reputation had suffered thereby.

The defendant denied having used the alleged defamatory expressions, and pleaded that, even if he had used them, the occasion was privileged, inasmuch as he wished to prevent a marriage, then imminent, between his wife's brother's son with a girl brought up by plaintiff and her alleged husband.

The defendant attempted, in his defence, to prove the identity of the plaintiff with a woman of questionable character bearing the same name. The Munsif disbelived the evidence and awarded the plaintiff Rs. 300 damages and Rs. 145 costs, on the ground that she was a Brahman and had been slandered publicly in the presence of the village Magistrate and others of her caste.

On appeal the Subordinate Judge reversed this decree, holding that the defendant acted *bonafide* in making the imputations trying to prevent the marriage of his kinsman with plaintiff's forster daughter.

Decision—The appellant was held entitled to reasonable damages and costs.

Judgment—Plaintiff appealed to the High Court. The question for determination was whether an action for damages for slander can be maintained without proof of special damages in cases in which it would not be allowed in English Courts. The English law recognises that defamatory words are actionable even without proof of special damage, although they may not impute a feloy nor affect professional character, provided that they are written or printed or published although the same words are not actionable if uttered *viva voce*.

The essence of the cause of action is the harm suffered by the person defamed, and the question as to whether the injury was caused with more or less deliberation ought not to deprive the injured person of a civil remedy for the injury though it may properly be considered if the Court is at liberty to award what are called exemplary damages.

The publication of defamatory imputation in a newspaper circulated extensively in a place where the person defamed in unknown may cause him for less injury, whether pecuniary or sentimental, than its publication orally, in the neighbourhood in which he resides, to his acquaintances or to persons who can influence his advancement in life.

In this country, the Court is not bound to adopt the rules regulating compensation for injuries which are recognized by the English Courts. The distinction drawn by the English law between written or printed and oral slander has been condemned, by many eminent English lawyers. The High Court, therefore, felt justified in giving effect to its conviction that the rule under consideration was not founded on natural justice and should not be imported into the law of British India.

Disregarding the distinction between the method of publication adopted, the questions which demand serious consideration are whether or not actions may be maintained for injury to the reputation which may result only in mental pain, and whether damages may be awarded which are in their nature more or less punitive.

If in any case, it is allowable to bring such action, it appears that they should be permitted where a mischievous or malicious person has without foundation set in circulation defamatory charges against his neighbour. It is often impossible to bring specific proof of the damage which a man may suffer in his business or in his friendships from such an injury. The injury may be occassioned before he has any opportunity of resulting the slander, and the memory of the slander may survive its contradiction, and may at any time influence his neighbours unconsciously to his disadvantage, nor is the suffering trivial which such a wrong may inflict on its victim.

Wider experience has persuaded English Judges that frivolous and vindictive litigation is countenanced by conceding too great liberty for the institution of suits for defamation, and it has been the object of the English law so far as possible to set limits to such actions. Some of the restrictions are already recognized by Indian law. Words of mere vulgar abuse are not punished as defamation. But it is not possible to accept the limitation of the English law, which denies a civil remedy unless pecuniary damage is established or may be predicted as almost certainly probable.

Beyond the difficulty of estimating mental pain, there is no greater reason for refusing man compensation for a wrong resulting in such pain than for refusing compensation for a wrong resulting in other physical suffering or in pecuniary loss, and that the true test of the right to maintain the suit should be whether the defamatory expressions were used at a time and under such circumstances as to induce in the person defamed reasonable apprehension that his reputation had been injured and to inflict on him the pain consequent on such a belief.

Mere hastly expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would, of course, not be actionable, but when a person either maliciously or with such carelessness to inquire into truth as is sometimes described as legal malice, deliberately defames another, he ought to be held responsible for dameges for the mental suffering his wrongdoing expressions. The action should be allowed where the defamation in such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming.

In the present instance, the appellant had established a *prima facie* case, which, on the principles would entitle her to relief. If the expression has been used in a private place and only to the youth who was to be married, or to any of his relations who could influence him to renounce the marriage, the respondent might possibly have successfully pleaded privilege, but the evidence accepted by the Court shows he uttered them in the open street and to persons who had no concern with the marriage ; the occasion, then, was not privileged.

The Judges were unwilling to give their adhersion to the principle of vindictive damages. In their opinion a distinction should be drawn between cases where the slanderer acts from mere carelessness, or in an honest but mistaken belief as to his duty, and cases, where the slanderer is insolent without any provocation or is influenced by a desire to gratify his enmity. The person defamed may be content to accept a sum sufficient to establish his innocence of the charge made in the former case, in the letter he is entitled to full compensation for the pain inflicted on him.

As to the good faith of the respondent, it is not shown that he made any reasonable inquiry into the truth of the defamatory statements to which he gave circulation. On the contrary, he made them after they had been proved unture, and in this suit he has again maintained their truth and has given evidence to establish it.

The appellant was held entitled to reasonable damages :—

Principles laid down—(1) The rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India.

(2) If defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained.

(3) An action will not be for vulgar abuse or hasty' expression, but for malicious or culpable oral defamation an action will lie.

(4) Vindictive damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously for the pain suffered, and in the former to a sum sufficient to establish his innocence by the charges made.

(*Appeal allowed*).

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(13)

Hulton and Co.

Vs.

Jones

[1910 AC 20]

Introduction—This case deals with the principles of *innuendo*, an important topic in defamation.

Facts of the Case—Mr. Artenus Jones, a Barrister in practice, had been at one time on the staff of the 'Sunday Chronicle, a newspaper owned and published by the appellants, and contributed articles signed by himself to some of the appellant's publications. The appellants published in the Sunday Chronicle an article defamatory of a person described as 'Artenus Jones'. At the trial of an action brought by the respondent against the appellants, friends of the respondent gave evidence that they had read the libel and belived it to refer to the respondent. The evidence of the author of the article and of the editor of the 'Sunday Chronicle' that they did not know of the existence of the respondent was accepted as true by the respondent's counsel. The jury found a verdict for the plaintiff for £ 1750 damages, and judgment was enterd for him.

Upon an application by the defendants to set aside the verdict and judgment and to order a new trial, or alternatively to enter judgment for the defendants, the Court of Appeal affirmed the judgment and dismissed the application. Hence an appeal was taken to the House of Lords.

Decision—The plaintiff was entitled to maintain the action.

Judgment—Libel is a tortious act. What does the tort consist in ? It consists in using a language which other knowing the circumstance would reasonably think to be defamatory of the person complaining of an injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did the both. He has none-the -less imputed something disgraceful and has none-the-less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under these circumstances he has no defence to the action, however, excellent his intention.

The real point upon which the verdict must turn is, ought or ought not sensible and reasonable people reading the article to think that it was a mere imaginary person. If any reasonable person would think in that way, it is not actionable at all. If on the other hand, if the people would suppose it to mean some real person—those who did not know the plaintiff of course would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable, subject to such damage as under all circumstances, are fair and right to give to the plaintiff. Applying the law to as enunciated above, to the present case, the jury rightly held that the action to be maintainable and respondent entitled to damages because reasonable people reading the article and knowing the plaintiff, would think that the article referred to the plaintiff.

Principles laid down—In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff.

(*Appeal dismissed*)

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(14)

Abrath

Vs.

The North-Eastern Railway Company

[1888 II QBD 440]

Introduction—This is a case for malicious prosecution and lays down the rule as to on whom the onus of proving the facts, asserted lending to establish reasonable and probable cause, lies.

Facts of the Case—The plaintiff, a doctor, had attended one McMann for personal injuries alleged to have been sustained in a collision between two trains upon the defendant's railway, McMann brought an action against the defendants to recover compensation in respect of these injuries and upon the action coming on for trial, a compromise was effected by the defendants agreeing to pay McMann a large sum by way of damages and costs. Subsequently the defendants, acting upon information obtained as the result of inquiries they had caused to be made, resolved to prosecute Dr. Abrath the plaintiff in the present action, for a conspiracy with intent to defraud. An information was accordingly laid before certain justices of the country, who committed Dr. Abrath for trial. He was tried and acquitted, and thereupon commenced the present action against the defendants.

Upon these facts Cane J. left three questions to the jury :

(1) Did the defendants in prosecuting the plaintiff take reasonable care to inform themselves of the true state of the case ?

(2) Did they honestly believe the case which they laid before the magistrates ?

(3) Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff ?

With respect to the two first questions the learned Judge directed the jury that, if they answered them in the affirmative, then the defendants had reasonable and probable cause for the prosecution, and were, entitled to a verdict, and he further directed the jury with respect to those two questions that the onus of proving that the defendants did not take reasonable care to inform themselves of the true state of the case, and did not honestly believe the case which they laid before the magistrate, lay upon the plaintiff.

The jury answered the two first question in the affirmative, but gave no answer to the third question, and Cane, J., thereupon directed a verdict to be entered for the defendants, and gave judgment for them.

The plaintiff obtained a rule calling upon the defendants to show cause why the verdict and judgment should not be set aside, and a new trial had on the ground of misdirection.

Decision—A substantial miscarriage may have been caused by the misdirection, and therefore, the Court cannot act under the power, given by Or. XXXIX, r. 3, and save the expense of a new trial by discharging the rule which is that the onus rests on the person affirming the person who for his own purposes asserts facts to the truth of which he pledges himself.

Judgement—Whether or not the defendants had reasonable and probable cause to prosecute the plaintiff was one of the issues in the cause. But with respect to that issue the onus no doubt was upon the plaintiff. That issue could not have been left in a direct form to the jury.

It is for the Judge to say whether or not there was reasonable and probable cause though the jury should be asked to find every fact in dispute which may assist him or he may consider necessary in determining that question There may perhaps be uncontradicted facts other than those left to the jury, and the judge no doubt may take those uncontradicted facts into consideration. But it was argued for the plaintiff that, where the defendant undertakes to bring forward facts for the purpose of satisfying not the jury but the judge that there was reasonable and probable cause for prosecuting, the onus of proving of those facts is upon the person who brings them forward. On consideration the Court was satisfied that this contention was founded upon a right view of the law.

"It is impossible, for the plaintiff in an action for malicious prosecution, to know what course the defendant took to satisfy himself, or by what means he did satisfy himself, of the probable truth, of the information conveyed to him, upon which he determined to prosecute.

At any rate it is not probable that in the majority of actions for malicious prosecution the plaintiff can know whether the defendants took reasonable care to inform themselves of the true state of the case, or whether they honestly believed in their case. The court, therefore, thought that the general rule of law should followed, which is that the onus rests on the person affirming the person who for own purposes asserts fact to the truth of which he pledges himself.

Under the circumstances of the case, and looking at the course of the case took at the trial with respect to the noncalling of witnesses by the defendants and other matters, the Court could not avoid coming to the conclusion that a substantial miscarriage may have been caused by the misdirection, and therefore the Court could not act under the power given by Or. XXXIX, r. 3, and save the expenses of a new trial by discharging the rule. The court was of opinion that the rule must be made absolute.

Principles laid down—In an action for malicious prosecution, where the plaintiff makes out a *prima faice* case, and the Judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of facts to the jury, the onus of proving the existence of such facts as tend to establish reasonable and probable cause lies upon the defendant.

(*Rule absolute*).

(15)

(*Rylands*)
Vs.
Fletcher

[1868 LR 3 HL 330]

Introduction—It is an important case in the law of torts, which has to a very great extent developed the torts of strict liability.

Facts of the Case—Rylands employed independent contractors, to contract a reservoir on his land. In the course of the work, the contractors, came upon some old shafts and passages on Ryland's land. They communicated with the mines of Fletcher, a neighbour of Rylands ; but no one suspected this for they appeared to be filled with earth.

The men filled up these shafts with soil, but, as it turned out they did not exercise sufficient skill and care in doing so, when the reservoir came to be filled the water broke through the bottom, escaped down the shafts. and flowed through some old abandoned coal workings, of the existence of which no one was aware and flooded them. It was found as a fact that, while Rylands had not been negligent, the contractors had been.

Fletcher sued Rylands in an action for damages. The Court of Exchequer, by a majority, held that Fletcher could recover nothing. The Court of Exchequer Chamber unanimously reversed this decision and gave judgment for Fletcher. An appeal was then filed.

Decision—The House of Lords unanimously, and in a considered judgment affirmed the judgment of the Court of Exchequre Chamber.

Judgment—If in the natural user of the land there had been any accumulation of water either on the surface or underground, and if, by the operation of the laws of nature that accumulation of water had passed off into the mines occupied that the result had taken place but if the defendants had desired to put the laid for a non-natural use, and if in consequence of their doing so, some harm is caused by the plaintiff, *i. e.*, by the escape of the water to his premises then the defendants would be liable.

The House of Lords approved the law laid down in this case by the Court of Exchequer Chamber, which stated. The true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep at in his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequennce of a vismajor, or the act of God, but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated, seems on principle just.

The person whose grass or corn is eated down by the escaping cattle of his neighbour, whose mine is flooded by the water from his neighbour's reservoir or whose cellar is invaded by the filth of his neighbour's privy or whose habitation is made—unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there). harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confirming it to his own property. But for his act in bringing it where no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, water or filth or strenches.'

Principles laid down—He who for his own purposes brings or accumulates on his land anything which if it escapes is likely to do mischief, is *prima faice* liable for all damages which is the natural consequence of its escape, whether he has been negligent or not.

(*Appeal dismissed*).

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(16)

Donoghue

Vs·

Stevenson

[1939 AC 562]

Introduction—This case deals with the liability of a manufacturer who puts dangerous goods upon the market. This is an important case on *negligence*. It lays down the general test for deciding whether there is a duty to take care.

Facts of the Case—The respondent, a manufacturer of ginger-beer, sold to a retailer ginger-beer in a bottle of dark glass. The bottle unknown to any one, contained the decomposed remains of a snail which had found its way into the bottle at the factory. The appellant's friend brought the bottle from the retailer. Both of them took its contents, but owing to the darkness of the glass nothing of the snail could be seen until the appellant's friend was about to finish the contents of the glass.

In consequence of the impurities in the ginger-beer which she had consumed, the appellant suffered from shock and severe gastro-enteritis. The appellant contended that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger-beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger-beer was filled into them, and that he had failed in both these duties and had so caused the accident.

The respondent objected to the above averments of the appellant. He contended that the averment were irrelevant and insufficient to support the conclusions of the summons. The Lord Ordinary held that the averments disclosed a good cause of action and allowed a proof. The second division by a majority recalled the interlocutor of the Lord Ordinary and dismissed the action. The appellant then preferred an appeal to the House of Lords ; who by a mijority of three to two, allowed the appeal.

Decision—By Scots and English law alike the manufacturer of an article of food, medicine or the like sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

Judgment—The case has to be determined in accordance with Scots Law but the laws of Scotland and of England are the same. The law of both the countries appears to be that in order to support an action for damages for negligence the complaint has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. But in the present case the sole concern is with the question whether, as a matter of law in the circumstances alleged, the defender owned any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between the parties that give rise to the duty. To seek a complete logical definition of the general principle is probably to go beyond the function of the Judge, for the more general the definition the more likely it is to omit essentials or introduce non-essentials.

In English law there must be, and is, some general conception of relations giving rise to a duty of care. The liability for negligence, whether you style it such or treat it as in other systems as a species of culpa, is no doubt based upon a general public sentiment or moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to very person injured by them to demand relief.

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ; and the lawyer's question, who is my neighbour ? receives a restricted raply. You must take reasonable care to avoid acits or omissions which you can reasonably foresee would be likely to injure your neighbour, who them in law is my neighbour ?

The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplating as being so affected when I am directing my mind to the acts or omissons which are called in question. This is the doctrine enumerated in the case of *Heaven* Vs. *Pender*, 11 Q. B. D. 503, by Lord Esher, when it is limited by the notion of proximity introduced by Lord Eisher himself. He says :

> "That case established that under certain circumstances, one man owes a duty to another, even though there is no contract between them. if one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property".

In the present case, a manufacture puts up an article of food in a container which he knows will be opened by the actual consumer. Negligently, in the course of preparation, he allowed the contents to be mixed with poison. Thus, he committed a wrong. He owes a duty to the consumers to be careful. By placing the bottles in a way to exclude inspection, the manufacturer brought himself into direct relationship with the consumer with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. Under the circumstances, she was entitled to claim damages.

A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting upon of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

In cases like these, the circumstances that the injured party was not a party to the incidental contract of sale is immaterial. The sole question is whether the person who caused the injury owed a duty to the injured person.

In view of the above observations, the House of Lords held that the appelland was entitled to claim damages.

(*Appeal allowed*).

(17)

Addie and Sons Ltd.

Vs.

Dumbreck

[1929 AC 358]

Introduction—This case deals with the law governing the injury sustained by a trespasser, and the duty of care of occupiers and owners of land.

Facts of the Case—The respondent's son, four and a half years of age, was accidently killed through being crushed in the terminal wheel of a haulage system belonging to and worked by the plaintiff. The accident happened in a field at a spot about 100 yards from a public road. The field formed part of "View Park" colliery and was used as a dump for the deposit of ashes from the pithead. It was separated from the public road by a hedge in which there were at the time of the accident numerous large gaps, including a gap of 10 feet oppsite the point at which the accident took place.

There were two gates to the field, at one of which there was a notice board bearing the words : "Trespassers will be prosecuted." The haulage system consisted of an endless wire cable operated from time to time, as might be necessary, for the purpose of removing ashes from the pithead by an 8 Horse-Power electric motor situated at the pithed, while at the other end of the system there was a heavy horizontal iron wheel round which the cable passed and returned at a speed of from 2 to 2½m. p. h.

The wheel at the front, where the cable entered and left, was, in no way, enclosed or protected, while on the top it was covered by four covering board. In front of the wheel the cable had worn grooves or depressions in the adjacent surface of the ash-dump so that there was a space of eight inches or eight inches deep in the centre from ashes to covering board and rather more at the sides.

The respondent had warned his son not to enter colliery premises or to go near the wheel. The hedge was quite inadequate to keep the public and in particular, children, out of the ground which was, in fact, to the knowledge of the appellants, habitually traversed by members of the public as a short-cut and frequented by youths, and children of all ages.

The appellant's employees at times warned children out of the field and reproved adults, but, as the appellant knows, the children disregarded warnings and the adults continued to frequent the field. The watch kept by the appellant's servants was casual and ineffective, except in so far as it was directed to gaurding the wood piles and coal bings, and the ground in question was to the appellant's knnow ledge used as a playground by young children near the wheel and elsewhere.

The wheel was dangerous and attractive to children and insufficiently protected at the time of the accident. The child who was killed was a little over four years of age and the accident occurred owing to the child, when sitting on the cover of the wheel or in a position in front of and in close proximity to the pulley and rope, being caught and drawn into the mechanism when it was set in motion by the appellant's servants.

The father of the child brought an action for damages against company. The First division of the Court of Sessions held that the accident was due to the fault of the appellant in setting the haulage system in operation in the circumstances stated above without taking any precaution to avoid accident to persons frequenting the field in the near neighbourhood of the haulage system, and thep awarded damages to the respondents. The appellants brought the present appeal before the House of Lords.

Decision—The boy was a trespasser and went to the Colliery premises at his own risk, and that the comppany owed him no duty to protect him from injury.

Judgment—There are three categories in which persons visiting premises belonging to another may fall ; they may go:—

(1) by invitaion, express or implied ;
(2) with the leave and licence of the occupier ; and
(3) as trespasser.

The duty which rests upon the occupier of premises towards the persons who came on such premises differs according to the category into which the visitors fall.

(1) Towards the *invitee*, the occupier has the duty to taking reasonable care that the premises are safe.

(2) Towards *persons who visit by leave and licence*, express or implied, the duty is much less stringent.

(3) Towards the *trespasser*, the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger.

The *trespasser* comes on the premises at his own risk. An occupier is in such a case liable only where the injury is due to some useful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the treaspasser.

Lord Sumner in *Latham* Vs. *Johnson*, 1913, I. K. B. 398 held :

> "Where a question arises, not between the parties who are both present in the exercise of equal rights *inter se*, but between parties of whom one is the owner or occupier of the place and the other, the party injured, is not there as of right, but must justify his presence there if he can, the law has long recognised three categories of obligations. In these the duty of the owner or occupier to use care, if it exists at all, is graduated distinctly...contractual obligations of course stand apart. The lowest is the duty towards a *trespasser*. More care, though not much, is owed to a licence—more again to an *invitee*."

With regard to *trespassers* he laid down that the owner of the property is under a duty not to injure the trespasser wilfully—not to do a wilful act in reckless disregard or ordinary humanity towards him : but otherwise a man trespasses at his own risk. The rule as to *licensee* is that they must take the premises as they find them apart from concealed dangers ; where dangers are obvious they must run the risk of them. Their Lordships fully agreed with this classification.

In the present case, the question is, was the child, a trespasser or a licensee ? As to invitee, there is obviously to question. (On this point, Their Lordships decided to take the findings as they stood). Accorded permission is out of the case, but licence may be either express or implied. There is no finding in terms that licence was implied. Taking the situation as it is disclosed on the findings as a whole, it can be surmised that implied permission is not proved.

There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees. Of course, a proprietor may do nothing at all to prevent people coming over this lands and they may come so often that permission will be held to be implied, or he may do something, but that something so half-heartedly as to be equivalent to doing nothing.

For instance, a mere putting up of a notice "No Trespassers Allowed" or "Strictly Private", followed, when people often come, by no further steps, would leave it open for a Judge of Jury to hold implied permission. But when a proprietor protests and go on protesting, turning away people when he meets them, as he did here, and giving no countenance is anything that he does to their presence here, then we think no Court has a right to say that permission must be implied. In such a case as this, it is permission that must be proved, not tolerance, though toletance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission. We, therefore, find that the *child who met with an accident in this case was a trespasser.*

On the duty to the *trespassers* there is a considerable body of authority. There is not duty, save only that of not inflicting malicious injury. In case of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who the trespasser.

It is quite otherwise in case of *licensees*, because there you are brought into contact with what is known as trap and allurement. What is allurment and a trap to a child is not so to an adult. Then we have the doctrine of *contributory negligence* affecting an adult but not affecting a very young child.

In the present case, had the child been a licensee we would have held the defendants liable ; because, if the complainer had been an adult. But if the person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him, he may not sheet him ; he may not set up a spring gun, for that is just to arrange to sheet him without personally firing the shot.

Their Lordships then finally turned to the law laid down by the Privy Council in *Grand Trunk Railway of Canada* Vs. *Barnett*, 1911 A. C. 361, which is "the general rule is that a man of trespasses at his own risk."

As regards the respondent's contention that the child may properly be regarded as having been at the wheel at the time of the accident with the leave and licence of the appellants, the Court observed that the finding of fact effectually negative that view. The circumstances of the case show that in law the respondent's son was a mere trespasser, and that as such the appellants owed him no duty to protect him from injury.

Principles laid down—The owner of the property is under a duty not to injure the trespaseer wilfully ; not to do a wilful act in reckless disregard of ordinary humanity towards him ; but otherwise a man trespasses at his own risk.

(*Appeal allowed*).

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(18)

Christie

Vs.

Leachinsky

[1947 AC 573 HL]

Introduction—This is the case of an illegal arrest without warrant, where the ground of arrest was not communicated at the time when the person was arrested and was kept in the prison.

Facts of the Case—Leachinsky was a dealer in 'rags' or 'waste' who bought supplies from time to time from Michaelson in Leicester.

In August, 1942 he bought three bales of waste, and in picking them up asked Michaelson if he had any 'remanants' from which he might make a dress for his wife. Michaelson said he had, and Leachinsky bought a considerable number of remnants and had them packed in a single bale. The four bales were shipped to Leachinsky's ware-house in Liverpool, and they were all described as 'waste'. At the time of the purchase of other remnants, ware-rationing restrictions on the purchase and sale of cloth were in effect.

When the goods arrived in Liverpool the police, being suspicious examined the goods and discovered that one of the bales contained cloth and not waste. When Leachinsky commenced to unload the bales, he himself set aside the bale of cloth. Charistie and Morris, police officers. then questioned Leachinsky about a bale of cloth and the latter professed to know nothing about such cloth. The officers, not satisfied with the explanation, arrested Leachinsky under the provisions of the Liverpool Corporation Act, 1921.

This act provided that if a person's name and address were unknown, he could be arrested and brought before the court to give an explanation of the possession of the goods believed to have been stolen by same one, although not necessarily by the person arrested. The two police officers knew Leachinsky's name and address, and later, in evidence, Charistie admitted that he knew he had no power to arrest under the above Act and made the arrest in this way simply because it was "more convenient."

Leachinsky was charged in Police Court with unlawful possession" and after spending a night in jail was brought before a magistrate, when a remand of one week in custody was granted. During this period the police had seen Michaelson in Leichester and the latter had denied that he had sold the goods to Leachinsky and claimed that they had been taken from him without his authority, when Leachinsky was brought before the magistrate, the police withdrew the charge of unlawful possession and Deachinsky was discharged. Before he could leave the court he was re-arrested for theft of the remnants.

At his subsequent trial he was acquitted and Michaelson was proved to have been lying. Leachinsky brought action against Michaelson for libel and recovered £250. Leachinsky then brought action for false imprisonment against Christie and Morris.

The Trial Judge gave the judgment for the defendants. Against this, Leachinsky brought an appeal and the Court of Appeal allowed the appeal and entered judgment for the plaintiff for false imprisonment with damages to be assessed. Christie and Morris appealed to the House of Lords.

Decision—(1) Held by the House of Lords (affirming the judgment of the Court of Appeal) that apart from special circumstances (which did not exist in this case) an arrest without warrant can be justified only if it is an arrest on a charge made known to the person arrested, and the plea of justification therefore failed.

(2) Held by the House of Lords reversing the judgment of the Courts of Appeal that the second imprisonment was justified, since the respondent then knew for what alleged felony he was being detained.

Judgment—When the appellants arrested the respondent, they in fact, suspected that he held stolen bale of cloth, or had received it knowing that it was stolen, and, further that they had reasonable grounds for that suspicion. If, then, the appellants reasonably suspected that the respondent had committed a felony, was it not their right to arrest him without a warrant ? And, if they did so arrest him, how is that the arrest can be branded as illegal and an action for false imprisonment be against them ?

First, it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. It is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested ?

It is to be remembered that right of the constable in or out of uniform is, except for a circumstanced irrelevant to the present discussion, the same as that of every other citizen. Is citizen *A* bound to submit unresistingly to arrest by citizen *B* in ignorance of the charge made against him ? I think, that cannot be the law of England. Blind, unquestioning obedience is law of tyrants and slaves. I would, therefore, submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested. The law requires that when an arrest proceeds on a warrant, the warrant should state the charge on which the arrest is made.

I can see no valid reason why this safeguard for the subject should not equally be his when the arrest is made without a warrant. The exigency of the situation, which justified or demands arrest without a warrant, cannot justify or demand either a refusal to state the reason of arrest or a mis-statement of the reason. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may without a moment's delay take such steps as will enable him to regain it.

It is not an essential condition of lawful arrest that the constable should, at the time of arrest, formulate any charge at all, much less the charge which may ultimately be found in the indictment, but this is the only qualification to the general proposition stated above.

It leaves untouched the principle that the arrested man is entitled to be told what is the act for which he is arrested. The "charge" ultimately made will depend on the view taken by the law of his act.

In other words, the arrested man is left in no doubt that the arrest is made on the basis of facts alleged to constitute crime on his part. If so, it is manifestly wrong that a police constable arresting him for one crime should profess to arrest him for another.

It is clear then, that, whatever may have been the secret thought of the constables at the time of arrest and detention, they allowed the respondent to think that he was being arrested for being "in unlawful possession" of certain goods, an offence which was at the most a misdemeanour within the Liverpool Act and could not, except under conditions which did not obtatin here, justify an arrest without a warrant, and was described in terms not calculated to being home to him that he was suspected of stealing or receiving the goods.

In these cricumstances the initial arrest and detention were wrongful. He was not aware and was not made aware of the act alleged to constitute his crime, but was misled by a statement which was calculated to suggest to his uneasy conscience that he was guilty of a so-called back-market offense. They had from the administrative point of view a good motive. It will be found in an answer to to a question, which, though it related to a later state of the proceedings, is equally applieable to the earlier : 'Why did not then charge him with larceny?' To this the answer was : 'Because that larceny was committed at Leicester and it would then be a matter of withdrawing one charge and handing him over to Leicester. Unlawful possession was the most convenient charge at the time until he could be handed over to the Leicester City Police'.

Their Lordship held that the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other. This case proclaims once again that a man is not to be deprived of his liberty except in due course of process of law.

(*Appeal dismissed as regards the first imprisonment and allowed as regards the second imprisonment*).

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(19)

Uchchab Bhole

Vs.

Shri Lord Jagannath

[AIR 449 Orissa 80]

Introduction - This case deals with the tort of 'conspiracy to injure and lays down certain important principles.

Facts of the Case—The plaintiff brought an action in tort for recovery of damages against 92 defendants on the allegation that the defendants had entered into a conspiracy amongst themselves with an avowed object of cutting and carrying away the paddy crops from the lands raised by the plaintiff with his own ploughs.

According to the plaint, the aforesaid malevolent couspiracy was but an easy and natural outcome of the Erbag Village Krushak-Sangh under the leadership of one Mohan Das of which the purpose was to defy and disregard the privileges so far enjoyed by the landlords, in their *Nijdakhli* lands as to facilitate acquisition of tenancy rights therein.

Common object of the combination was alleged to cut and carry away the crops raised by the plaintiffs in the disputed lands towards attainment of the ultimate object of establishing tenancy rights in plaintiff's (proprietor's private lands in the village.

The various defendants advanced diverse please which need no specific notice in view of the proposed order in the suit. Mainly, they were of two classes, one being complete denial of the plaintiff's version and the other plea of confession and avoidance (by justification).

The trial court negatived the plea of justification and based his finding on what he cosidered to be proof of illegal conspiracy. Appeal was then taken to the High Court.

Decision—The proof adduced by the plaintiff fell far short of proving a conspiracy to injure Conspiracy to injure understood in its legal sense not having been established, the plaintiff was not entitled to join in one suit all the defendants in order to recover damages jointly and severally in a consolidated sum.

Judgment—The cases *Mogul Steamship* Vs. *Macgregor* (1892 A. C. 25), *Allen* Vs. *Flood*) 1898, A. C. I and *Quinn* Vs. *Leathem* 1901 A. C. 495), as well as crofter company's case (1942 A. C. 435) have well established that conspiracy is the gist of the wrong in many cases and is in the fact of the combination that the unlawfulness resides. In such cases conspiracy is an independent tort.

In order to give rise to the civil rights of action, it is not complete unless the conspirators do acts in pursuance of their agreement to the damage of the plaintiff. The emergence of civil liablility out of conspiracy is confirmed to "conspiracy to injure" even though the end, were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regareded as a legal wrong.

In this sense, conspiracy is the gist of the wrong though damage is necessary to complete the cause of action. There is a clear and definite distinction between what Lord Dunedin in *Sorrel* Vs. *Smith* (1925 A.C. 700) calls 'a conspiracy to injure', and 'a set of acts dictated by business interests'.'Business interests', according to Lord Wright Crofter's case, would include 'other legitimate interests'. Referring to this aspect it is well established that the plaintiff cannot complain simply because the right to freedom in conducting his trade or business has been interfered with. That righ is not an absolute or unconditional right.

'A conspiracy to injure' involves *ex vi termini* (an intention injure) or more accurately, a common intention, and agreement to injure. The word 'injure', is here used in its correct meaning of wrongful harm (damnum cum injuria), as contrasted against damnum absque injuria. The question that obviously arises in every case is when is the harm wrongful ? Broadly speaking, it is that harm which flows from infringement of a legal right without any justification on the part of the wrong doer.

Illegal conspiracy presupposes 'mens rea', *i. e.*, an intention to injure. Intention is very difficult to define and it is generally determined by reference to overt acts and to the circumstances in which they are done. There is every danger to confound internal feelings with outward employed by him. The true contrast is between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberete damage without any such just cause (sometimes in determining the real object, a contrast between what is immediate and what is remote is made).

In their practical aspects, there is hardly any distinction between intention and object. Intention has to be judged by the ultimate object in view. Serving one's own legtimate interest, irrespective of its immediate result injurious or otherwise upon another, would not make the intention unlawful, particularly in civil activities in tort.

The next question is how far malevolence is to be regarded as an essential element of 'conspiracy to injure'. Lord Cave, in *Sorriel* Vs. *Smith* stated the law as follows :—

(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable; and

(2) If the real purpose of the combination is not to injure another, but to foward or defend the trade of those who enter, into it, then no wrong is committed and no action will lie although damage to another ensures".

These two propositions are, generally speaking, workable rules. Lord Wright in Crofter's case held that "malevolence is not a necessary element to constitute tort ; mere malevolence does not damage to anyone. A desire to injure does not necessarily involve malevolence. It may be motivated by wantonness or some object not justifiable".

Real purpose of the combination is the test not existence or otherwise of spite or ill will or bad motive ; "The test is not what is the natural result of the combined action, or what is the resulting damage but what is, in the truth, the object in the mind of the combiners" (per *Viscount Simon*, in *Sorrel's* case).

The next point to be considered is that there may be cases where the combination has more than one object or purpose. In such cases, it is a settled law that it is the predominant purpose that will settle the controversy, *viz.*, if the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners, it is not a toritious conspiracy. The combiners may feel that they are killing two birds with one stone, and, even though their main purposes may be to protect their own legitimate interests, notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiff's right.

It is at the same time, a matter of indifference that amongst the combiners, different persons have different interests to protect or promote, reasonable self-interest in trade or business being a just cause of excuse. It has been held in Mogul Steamship's case that the circumstances that their business interests are, by no means, the same, is not a ground holding that the combination is illegal. But the defence of toose, however, who were actuated merely by hate or vindictive spite or with no just excuse at all should not succeed.

In such a case the plaintiffs have to establish :

(*i*) an agreement ;
(*ii*) to effect an unlawful purpose ; and
(*iii*) resulting in damage to them.

They most establish that they have been damnified by a conspiracy to injure, *i. e.*, that there was a wilful and concerted intention to injure without just cause and consequential damage. It is not till then for the defendants to justify their acts.

Coming now, to the present case, the plaintiffs have not even attempted to prove malevolence as against, by far the largest majority of the defendants—joint-tort-feasors so as to *prima faice* exclude just cause or excuse on their part. The only proof of combination adduced by the plaintiffs consists of their being members of the village Krishak Sangh along with the other villagers and that in one or two meetings of the Sangh, it was resolved that the Math property shall be Kotha (Public or common) property. However, there is no specified proof either of the membership or of the presence and partaking of each and every meeting of the Sangh.

The defendants have a right to combine for the protection and promotion of their legitimate interest inasmuch as the plaintiffs have a right not to be interfered within an unlawful manner, by illegal conspiracy in peaceful enjoyment of their property rights. The avowed object of the Krishak Sangh is to protect the interest of the tenants in the lands cultivated and cultivable by them, as against the landlords. If they form a combination with the object of achieving that end, it cannot amount to conspiracy in the sense of its being a tort even though the immediate result of the conspiracy with result in damages to the plaintiffs, *i. e.*, when the defendant's acts are supported by just cause.

The plaintiffs wanted to introduce a novel system in the mode of their settlement of their Nijdakhali lands for cultivation, on annual lease basis with a condition to quit at the end of every year. This was an attempt to take the lands out of ryotwari stock into the proprietor's private domain. For this purpose, the plaintiffs wanted that no tenant should occupy and cultivate the same land for more than a year. He may be given some other lands and not the same land for every successive year.

The tenants, on the other hand, would insist upon holding over the same lands which they and their ancestors have been cultivating for all time. If the tenants combine to protect and promote their interest in this manner so that they would be protected against arbitrary eviction by the landlords, it is certainly a legitimate interest for the protection of which they are entitled to combine. If the defendants wanted to enforce their rights it was on the basis that they had tenancy rights in them.

As observed by Lord Wright in Crofter's case, the reality of the object is not a matter to be determined by court who shall hold in favour of the combiners if it has reasons to believe that they had a *bonafide* belief that the course adopted by them was necessary for protection of their legitimate interest and if they did not take recourse to unlawful means. Evidence shows that all the defendants did not jointly cut and carry away the crops. Some of them did not, at all, join in the cutting and carrying away.

Admittedly, all of them did not join in cutting the crops from each and every field but respective tenants or groups of tenants cut and carried away the crops according as they claimed having right to do so in respect of any particular field or fields. If the plaintiffs pleaded anything in justification of their seeing them jointly, it was that they all conspired and had a common object as set forth above.

Under the circumstances, 'conspiracy to injure', under-stood in its legal sense having never been established, the plaintiffs were not entitled to join in one suit all the defendants in order to recover damages jointly and severally in consolidated sum of Rs. 7,000 and odd. Under the circumstances, the plaintiff's suit is certainly not maintainable in the form in which it has been cast.

This, however, will not completely exonerate those particular defendants, who, apart from the conspiracy, unlawfully cut and carried away the crops of the lands which had been cultivated by the plaintiff as their Nijdakhali lands.

Under such circumstances, the plaintiffs were given the option to select such of the defendants against whom they can maintain a suit for damage for the tortions acts of wrongfully cutting and carring away the crope raised by the plaintiffs. It was made clear to them that they cannot be allowed to sue afresh on the ground of "conspiracy to injure."

This concession to sue against some of the defendants is on the ground that the frame of the suit differs from formal defects and that the law of conspiraey as a tort, most complex and intricate as it is, is seldom well-understood in Mofussile Courts. It should made clear, however, that the plaintiffs are not, by this leave, allowed to recover damages on the ground of conspiracy as that case has failed once for all and cannot be allowed to be reagitated. Nothing in this order shall, however, be understood to mean that we have come to any finding that the said defendants are, in fact, wrong doers. It will be open to the plaintiffs to show that they are so and it will be open to the respective defendants to establish that they are supported in their action by pre-existing rights to the lands.

(*Ordered accordingly*).

Overseas Tankship (*U. K.*) *Ltd* ... ... Appellants,

versus

Morts Dock and Engineering Co. Ltd. ... ... Respondents.

(*The Wagon Mound*).

[1961 AC 388]

Facts of the Case—Morts Dock & Engineering Co., Ltd., were carrying on business of ship-building, ship-repairing and general engineering at Morts Bay, Balmain in the port of Sydney. They owned and used for their business a timber wharf known as Sheerlegs Wharf about 400 feet in length and 40 feet wide. A huge quantity of tools and equipment were placed there. In the month of October and November, 1951 a vessel known as 'Corrimel' was moored alongside the wharf. It was being refitted by the respondent company. Her moster was lying on the wharf and a number of respondents' employees were working both upon the vessel and in the wharf. They were using electric and oxyacetylene welding equipment for that purpose.

The appellants were charterers by demise of the S. S. Wagon Mound, an oil-burning vessel. This vessel was moored at the Caltex wharf at about 600 feet away from Sheiser legs Wharf. She was there from about 9 a. m. on October 29 until 11 a. m. on October 30, 1951 for the purpose of dilcharging gasolene products and taking in bunkering oil. In the early hours of October 30, 1951 a large quantity of bunkering oil was, through the carelessness of the appellants' servents allowed to spill into the bay. By 10-30 on the same morning it spread over a considerable part of the bay. Its concentration was thickest near the wharf of the respondents where the work was going on. In the meantime the Wagon Mound set sail and left the harbour.

After coming to know about the spilt bunkering oil in the bay water the Works Manager of the respondent company instructed the workmen that no welding or burning should be carried out until further orders. He enquired from the Manager of the Caltex Oil Company, at whose wharf the wagon Mound was still berthed, as to whether they could safely continue their work on the wharf and upon the 'Corrimel'. The Manager of the Caltex Company gave instructions that the work might be carried on but at the same time directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil.

The work was accordingly carried on until 2 p. m. on November 1, 1951. During this period the condition of the spilt oil remained the same. At about 2 O'clock the oil near the wharf was somehow ignited and the wharf and the Corrimel caught fire, and a considerable damages was caused thereby.

Regarding the ignition, the judge later on found that there was floating in the oil underneath the wharf a peice of debris on which lay some smouldering cotton waste or rag which had been set on fire by some molten metal falling from the wharf. It was further found that the cotton waste or the rag burst into flames and set the floating oil a fire either directly or by first setting fire to a wooden pile coated with oil. This is how the floating oil became ignited due to which considerable damage was caused to Corrimel and the Seerlegs Wharf. The respondents brought an action for damages against the appellants.

Decision—Order of the Supreme Court of South Wales, so far as it related to damage caused by negligence, reversed but action remitted for that court to deal with so far as it related to damage caused by nuisance.

Judgment—In this case two points were raised. One was about the negligence and the other about nuisance. The Trial Judge found that the appellant did not know and could not reasonably be expected to have known that it (the furnace oil) was capable of being set afire when spread on water and that apart from the damage by fire the respondents have suffered some damage in that oil had congealed upon and interfered with the use of their shipways, which was "damage which beyond question was a direct result of the escape of the oil".

In appeal it was held that the damage was the direct result of the escape of the oil. Applying the test of the foreseeability the appellants could not reasonably be expected to have known that the oil would catch fire. The most important point which was decided in this case was the review of *In re* Polemis and Furnace Withy & Co. The decision of that case that the defendent was responsible for all the consequences of his negligent act was not accepted as a good law universally. The distinction between that case and the present case was that in, *In re* Polemis' case the damage was caused as a direct result of the negligent act. In the instant case Their Lordships expressed the opinion that "It should no longer be regarded as good law' It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified and that in some cases at least palpable injustice will be avoided. It does not seem consonent with current ideas of justice or morality that for an act of negligence, however, slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however, unforeseeable and however grave, so long as they can be said to be direct. It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order which requires the observance of a minimum standard of behaviour".

The essential factor in detreminig liability for the consequences of a tortious act of negligence is whether the damages is of such a kind as the reasonable man should have foreseen. Liability does not depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act; but if a man should not be held liable for damage unpredictable by a reasonable man because it was direct or natural equally, he should escape liability, however, indirect be the damage, if he foresaw or could have reasonably foreseen the intervening events which led to its being done. Foreseeability is thus the effective test—the direct consequence test leads to nowhere but the neverending and insoluble problem of causation.

Their Lordships observed, "It is no doubt proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage".

It was further observed that there is not one criterion for determining culpability and another for determining compensation ; unforeseeability of damage is relevant to liability or compensation. There can be no liability until the damage has been done ; it is not the act but the consequences on which tortious liability is founded.

It was further explained in this case that where a person has committed a tort and caused damage by negligence, he is liable for all the physical damage directly resulting from tortious act, even if it differs in type or character from the damage which heor a reasonable man could have foreseen as the result of his tortious act. Applying these tests it was held that the damage in the instant case was in fact directly traceable to the discharge of the oil and not to the operation of independent causes having no connection with the discharge of the oil except that they could not avoid its results.

Coming now to the point of nuisance Their Lordships observed that damages in nuisance follow the same rule as damages in negligence with regard to remoteness, and damages in trespass follow the same approach. The material on this point was not sufficient.

Concluding the judgment. Their Lordships remarked that they have been concerned primarily to displace the proposition that unforseeability is irrelevant if damage is 'direct'. In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. The liability for negligence, "whether you style it such or treat it as in other system as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrong-doing for which the offender must pay. It would be a departure from this sovereing principle if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act".

In the result Their Lordships advised His Majesty that this appeal should be allowed, and the respondent's action so far as it related to damage caused by the negligence of the appellants be dismissed, with costs, but that the action so far as it related to damage caused by nuisance should be remitted to the full court to be dealt with as that court may think fit.

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